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88-229

Supreme Court, U.S.
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No. 88-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DOW JONES & COMPANY, INC., CBS INC., NATIONAL BROADCASTING COMPANY, INC., THE ASSOCIATED PRESS, and NEWSDAY, INC.,

Petitioners,

—v.—

STANLEY SIMON, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a prior restraint on speech is subject to a different and less rigorous analysis under the First Amendment when it is challenged by potential recipients of, rather than persons desiring to utter, such speech.

2. Whether a court may enter a gag order virtually silencing defendants, their lawyers, and federal prosecutors on subjects related to a criminal prosecution before and during trial absent a finding by the court that the speech of the persons being gagged poses a serious and imminent threat to the defendants' Sixth Amendment right to be tried by an impartial jury.

3. Whether a gag order imposed on defendants, their lawyers, and federal prosecutors in a criminal case may ever be constitutionally valid under the First Amendment if (a) it restrains core political speech, including that of an incumbent Member of Congress, (b) it is entered without prior exploration of less restrictive alternatives, and (c) it is employed largely for purposes other than protection of defendants' rights to a fair trial.*

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* In addition to the petitioners in this Court, The New York Times Company and New York News Inc. were applicants in the District Court. The New York Times Company was an applicant-appellant in the Court of Appeals. The United States of America supported the position of the applicants in the District Court, but took no position in the Court of Appeals. In addition to respondent Stanley Simon, defendants Peter Neglia, John Mariotta, Bernard Ehrlich and Richard Biaggi were designated as appellees in the Court of Appeals, although only respondent Simon appeared in that court. Defendants Mario Biaggi and Ronald Betso have consistently taken no position on the order challenged in this petition.

Pursuant to Rule 28.1 of the Rules of this Court, the following companies are parents, subsidiaries (except wholly owned subsidiaries) or affiliates of petitioners: Telerate Inc. is a non-wholly owned subsidiary of petitioner Dow Jones & Company, Inc., General Electric Company is the parent of RCA Corporation which is in turn the parent of petitioner National Broadcasting Company, Inc., and The Times Mirror Company is the parent of petitioner Newsday, Inc.

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IN THE

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Petitioners,

—v.—

STANLEY SIMON, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on March 14, 1988.

OPINIONS BELOW

The March 14, 1988 opinion of the United States Court of Appeals for the Second Circuit is reported at 842 F.2d 603 (2d Cir. 1988) and is reproduced in the Appendix, *infra* at pp. 1a-17a. The July 10, 1987 opinion of the United States District Court for the Southern District of New York supporting the imposition of the gag order is reported at 664 F. Supp. 780 (S.D.N.Y. 1987) and is reproduced in the Appendix, *infra* at

pp. 20a-51a. The July 27, 1987 opinion of the District Court denying a motion for reargument is unreported and is reproduced in the Appendix, *infra* at pp. 53a-54a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 14, 1988. A timely Petition for Rehearing and Suggestion for Rehearing in Banc was denied on May 6, 1988. App. 55a-56a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves portions of the First and Sixth Amendments to the Constitution of the United States, as follows:

1. The First Amendment provides, in pertinent part, that:

> Congress shall make no law . . . abridging the freedom of speech or of the press . . . .

2. The Sixth Amendment provides, in pertinent part, that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

STATEMENT OF THE CASE

A. Entry of the Gag Order

On April 1, 1987, respondent Stanley Simon, former President of New York City's Borough of the Bronx, was indicted on charges of extortion, obstruction of justice, perjury, and tax evasion for profiting by misusing his public office on behalf of Wedtech Corp. As the Court of Appeals observed, "Wedtech's affairs and the activities of those associated with it have generated state, federal, and congressional investigations encompassing local, state, and federal officials including, among others, the Attorney General of the United States." 842 F.2d at 610.

App. 13a. A superseding indictment was returned on June 3, 1987 against incumbent Representative Mario Biaggi and five other persons in addition to Simon.

At the first status conference, held nine days after the initial indictment, the District Court entered a gag order prohibiting virtually all direct or indirect communications by trial participants to the public through the press. After the superseding indictment was handed down, five of the seven defendants, including Simon, assented to the interim gag order; two, including Representative Biaggi, took no position on it. The government opposed the order.

Members of the press, including petitioners, opposed the order and filed an application to vacate it on June 16, 1987. On July 10, 1987, with trial then scheduled to commence on November 9, 1987 (it in fact began on March 7, 1988), the District Court denied petitioners' applications, and entered the following modified order:

> "ORDERED, that the United States Attorney and the District Attorney for Bronx County, their representatives and agents, defendants Stanley Simon, Mario Biaggi, John Mariotta, Peter Neglia, Bernard Ehrlich, Richard Biaggi and Ronald Betso, and their counsel and representatives SHALL NOT MAKE ANY extrajudicial statement concerning this case (1) to any person associated with a public communications media, or (2) that a reasonable person would expect to be communicated to a public communications media, except that nothing in this Order shall prohibit any individual from:
>
> (A) Stating, without elaboration or characterization—
>
> (1) the general nature of an allegation or defense;
>
> (2) information contained in the public record;
>
> (3) the scheduling or result of any step in the proceedings; or
>
> (B) Explaining, without characterization, the contents or substance of any motion or step in the proceedings, to the extent such motion or step is a matter of public record."

664 F. Supp. at 797. App. 48a-49a. That order remained in effect to and through the trial; the case was submitted to the jury on July 30, 1988.[1]

The gag order prohibited defendant Mario Biaggi, a Member of Congress, personally or through his attorney from, for example, protesting his innocence to his constituents or charging publicly that his prosecution or any other action taken by the government was politically inspired. It similarly subjected the United States Attorney and the Bronx County District Attorney, whose office was cooperating in the prosecution, to the summary contempt power of the District Court if either responded to any such charge from anyone.

During the course of the trial, at least three motions were made seeking orders of contempt against trial participants for violating the gag order. Two of the motions were by the government seeking orders of contempt against Congressman Biaggi's lead trial counsel. The District Court has not yet ruled on those motions.

The pre-trial publicity in this case did not involve the dissemination to potential jurors of evidence that was unconstitutionally obtained or unusually compelling. There was no publication of a confession, suppressible physical evidence, prior criminal convictions, intimate or personal matters, or surreptitious audio or video tape-recordings of incriminating conversations or conduct. There was no suggestion that the District Court had difficulty controlling conduct in the courtroom, nor was there any allegation that either the press or the public had

1 While the order at issue will expire at the end of the trial, this petition is not moot. The dispute is one "capable of repetition, yet evading review," *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911), in both of the precise senses outlined in *Nebraska Press Association v. Stuart*, 427 U.S. 548 (1976): first, any convictions could be reversed and a new trial ordered, *Nebraska Press Association*, 427 U.S. at 546; second, a similar gag order affecting these petitioners is "capable of repetition." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602-03 (1982); *Nebraska Press Association*, 427 U.S. at 546-47.

ever attended pre-trial proceedings in unusual numbers or behaved in an inappropriate manner.

B. The Opinion of the District Court

In its July 10 opinion imposing the permanent gag order, the District Court first held that members of the press had standing to challenge the order as potential recipients of the forbidden speech. The court specifically found that, in the absence of an order, "an unrestrained field of attorneys and defendants would add . . . fuel to an already voracious fire of publicity . . .," *i.e.*, ungagged, trial participants would be willing speakers. 664 F. Supp at 793. App. 40a.[2]

The District Court expressly rejected any requirement that it find a "clear and present danger or a serious and imminent threat to a protected competing interest" to justify the gag order. The court therefore made no such findings. Instead, relying on *Sheppard v. Maxwell*, 384 U.S. 333 (1966), it held that "a reasonable likelihood that the activity restrained might result in an unfair trial" is sufficient. 664 F. Supp. at 791. App. 39a-40a.

The District Court expressly held that no findings of actual prejudice to defendants were required. It dismissed any suggestion that such findings were appropriate as "specious." 664 F. Supp. at 791-92. App. 38a. In sum, the District Court declared, "When a trial court finds extensive and pervasive pre-trial publicity, . . . [n]othing more is required." 664. F. Supp. at 791. App. 38a.

2 The availability of willing speakers absent the gag order is dramatically illustrated by the transcript of a television report placed in the record by respondent Simon. It includes Representative Biaggi's comment, "I regret my inability to respond to questions. Because I want to. I want to. To your question," followed by this exchange:

"Reporter: The congressman promised us a statement two days ago.

[Biaggi's counsel]: The judge has ordered a gag order . . . ."

App. 57a-58a.

> [A]t least in highly publicized cases, the proscription of statements concerning the merits of the case, the character of the defendants, the identity or credibility of potential witnesses, or the quality or content of evidence is both a duty of the trial court and constitutional *per se*. [Citation omitted.]

664 F. Supp. at 796. App. 48a. Apparently viewing defendants and their counsel, as well as the government, as sources of such prejudicial publicity, the court gagged them all.

In discussing whether less restrictive alternatives "would ensure a fair trial," the court again made no factual findings. 664 F. Supp. at 793. App. 41a. It disparaged a postponement of the trial as "unlikely" to reduce the volume of publicity; it made no finding, however, on any relationship between the volume of the publicity and possible prejudice to the right of defendants to receive a fair trial. *Id.* A change of venue was noted as one such possible alternative, but was not discussed. *Id.* (No defendant had moved for or expressed any intention to seek a change of venue.) The District Court also indicated a general lack of confidence in the efficacy of *voir dire*, limiting jury instructions, and sequestration, describing all such alternatives as merely "palliative." 664 F. Supp. at 794. App. 42a.

The District Court expressly justified the gag order as a means of addressing, prospectively, allegations (never to this day adjudicated) that prosecutors had unlawfully disclosed grand jury information. The District Court received no testimony concerning the sources of any of this publicity, however. And the Assistant United States Attorney assigned to the case emphatically denied that the government improperly released any information, terming most of the press reports "false" and therefore based on statements by "other people . . . who are totally unrelated to the investigation . . . ." Law enforcement officials had plainly not been the press' only sources in this matter. Press clippings in the record are replete with remarks about the investigation by others, particularly respondent Simon and his attorney.

The District Court also appeared to endorse the gag order to protect reputational and privacy interests of the accused. Indeed, the court asserted that its prior order was justified as a means of "protecting" defense counsel from themselves, observing:

> Defense counsel have been able to focus their attentions on trial preparation, rather than engaging in combative discourse with members of the press. Likewise, defendants have been able to prepare for trial and otherwise carry on with their lives in a less frenzied atmosphere.

664 F. Supp. at 794. App. 43a-44a.

The District Court opined that the interim order had "already had a salutary effect in this case" because it had silenced the press, prevented the distraction of defense counsel, and shielded the defendants from public view. 664 F. Supp. at 794. App. 43a. None of these accomplishments, of course, has any direct bearing on the Sixth Amendment interests theoretically at stake.

C. The Opinion of the Court of Appeals

The Court of Appeals affirmed on March 14, 1988. It agreed with the District Court's conclusion that, absent the gag order, there would be willing speakers. 842 F.2d at 608. App. 9a. Because petitioners were potential recipients of that speech, they had standing to challenge the order.

> [T]he rights of potential recipients of speech, like the news agencies, to challenge the abridgment of that speech has already been decided. [*Citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 76 (1976) (Powell, J. concurring).]

842 F.2d at 607. App. 7a-8a.

The Court of Appeals then held that, while the order constituted a prior restraint on those gagged, *it was not a prior*

restraint when challenged by petitioners, the potential recipients of the information.

> [W]e conclude that there is a fundamental difference between a gag order challenged by the individual gagged and one challenged by a third party; an order objected to by the former is properly characterized as a prior restraint, one opposed solely by the latter is not.

842 F.2d at 609. App. 11a.

Having thus eschewed prior restraint analysis, the court ruled that the "reasonable likelihood" test applied by the District Court was the proper legal standard:

> [T]he standard by which to measure justification [of the gag order] is whether there is a "reasonable likelihood" that pretrial publicity will prejudice a fair trial. *See Sheppard v. Maxwell*, 384 U.S. [333,] 363 [(1966)].

842 F.2d at 610. App. 12a-13a.

After a review of the facts, the Court of Appeals concluded:

> Based upon the sensational public nature of the case and the leaks of grand jury information, the district court found that failure to restrain the trial participants would add "fuel to an already voracious fire of publicity" and create "a real and substantial likelihood that some, if not all, defendants might be deprived of a fair trial." We are unable to say upon reviewing this record that the findings relied upon by the district court to support that conclusion are clearly erroneous.
>
> • • •
>
> We concur in the district court's perceptions and its prediction that the only effective recourse available was the use of a restraining order.

842 F.2d at 611, 612. App. 15a, 16a.

REASONS FOR GRANTING THE WRIT

This case presents important questions, never directly addressed by the Court, which arise frequently in high-profile criminal prosecutions: When and to what extent is it permissible under the First Amendment for a court to restrain the speech of prosecutors, defense counsel or defendants to assure that the defendants are tried "by an impartial jury," as required by the Sixth Amendment?[3]

The gag order problem arises in this case in starkest form. Among other things, the order directly suppressed core political speech. It restrained, for many months before and many months during trial, an incumbent Democratic Member of Congress from speaking out about his prosecution by a Republican United States Attorney and the Department of Justice in a Republican Administration. Motions to hold the Congressman's attorney in contempt are now pending before the District Court.

This case thus presents, in a dramatic though not unique context, a fundamental tension between First and Sixth Amendment rights and interests. The Court should grant certiorari to provide lower courts with adequate guidelines concerning the appropriate accommodation between these sometimes competing constitutional values.

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3 There is no catalog available of gag orders entered in criminal cases. A telephone inquiry to the United States Attorney's Office in Manhattan, however, discloses that, in the Southern District of New York alone, at least three other gag orders were in effect at the same time as the one challenged here: *United States v. Myerson*, 87 Cr. 796 (JFK) (allegations of misconduct while in public office of former Miss America serving as New York City Commissioner and sitting New York State Supreme Court Justice); *United States v. Salerno*, 86 Cr. 245 (MJL) (organized crime); *United States v. Ustica*, 84 Cr. 63 (VLB) (same).

A.

THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER A GAG ORDER ON TRIAL PARTICIPANTS, A PRIOR RESTRAINT ON SPEECH, IS SUBJECT TO LESS RIGOROUS ANALYSIS UNDER THE FIRST AMENDMENT SOLELY BECAUSE IT IS BEING CHALLENGED BY POTENTIAL RECIPIENTS OF THAT SPEECH RATHER THAN PERSONS DESIRING TO UTTER IT.

Contrary to the First Amendment jurisprudence of this Court, the Court of Appeals refused to treat the gag order as a prior restraint solely because potential recipients of speech, rather than potential speakers, were challenging it.

As both courts below correctly found, the gag order—a judicial order broadly silencing in advance potential communications by trial participants—was a prior restraint on speech.[4] Based on their conclusion that, absent the order, there were willing speakers, both courts also found that petitioners, as potential recipients of that speech, had standing to challenge the order.[5]

Then, however, the Court of Appeals embarked on a seriously flawed analysis of the order's constitutionality. It held

4 Petitioners, members of the press, do not claim that the order constituted a prior restraint on them. The press remained free to publish what it managed to learn.

The gag order is nonetheless a classic prior restraint on free expression. *Levine v. District Court*, 764 F.2d 590, 595 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986); *CBS Inc. v. Young*, 522 F.2d 234, 239 (6th Cir. 1975). *See Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248-49 (7th Cir. 1975) (discussing distinguishing features of prior restraints in context of rules on extrajudicial statements by lawyers). The object of a prior restraint "is not punishment, in the ordinary sense, but suppression of the offending" expression; "[t]his suppression is accomplished by enjoining publication, and that restraint is the object and effect" of the prior restraint. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 711, 712 (1931).

5 The Court of Appeals correctly based this finding on this Court's holding in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), that potential recipients of advertising as well as potential advertisers have standing to challenge under the First Amendment government advertising restraints. "[W]here a [willing] speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both." *Id.* at 756. The court also relied on the statement of Justice Powell, concurring in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 76 (1976) for the proposition that "[t]he corollary to the guarantee of free speech is that 'there be a full opportunity for everyone to receive the message.' " For the broader proposition that there is in a wide variety of contexts First Amendment protection for recipients of speech, the court also cited *Procunier v. Martinez*, 416 U.S. 396 (1974); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Stanley v. Georgia*, 394 U.S. 557 (1969); and *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

The Court of Appeals concluded:

> Throughout all these cases the First Amendment unwaveringly protects the right to receive information and ideas. A challenge by news agencies must certainly be permitted when the restrained speech, as here, concerns allegations of corruption by public officials in obtaining federal contracts.

842 F.2d at 607. App. 8a.

that, had the persons directly restrained by the order, the potential speakers, sought to lift it, the order would properly have been treated as a prior restraint. But because petitioners, potential listeners, chose to challenge it, the gag order was to be judged under a substantially more lenient standard. There is no warrant from this Court for lower federal and state courts to follow such a two-tiered approach. Such a method of analysis is contrary to fundamental constitutional principles and to the Court's First Amendment jurisprudence.

This Court has made it clear that prior restraints primarily endanger speech, not merely speakers. Thus, in *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976), the Court said:

> The thread running through all these cases is that prior restraints on *speech and publication* are the most serious and least tolerable infringement on First Amendment rights.[6]

6 By "these cases" the Court was referring to *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931); *Patterson v. Colorado ex rel. Attorney*

(emphasis added) The Court used the words "speech" (not speakers) and "publication" (not publishers) because the Court's focus was on aborted communications, not solely on the abridgment of the ability of speakers or publishers to express themselves.

The Court continued:

> A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.
>
> A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.

427 U.S. at 559. Again, the Court's expressed concern was "frozen" speech, not silenced speakers.

Similarly, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976), the Court declared: "[W]here a willing speaker exists . . . *the protection afforded is to the communication*, to its source and to its recipients both." (emphasis supplied.) There is no hint in *Virginia Pharmacy* that the restrictions were to be tested in some special attenuated fashion because potential recipients of information rather than its potential providers had mounted the First Amendment challenge. The Court scrutinized the effect on the "free flow of . . . information," 425 U.S. at 763, not on pharmacists or particular complaining consumers.

General, 205 U.S. 454 (1907); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); and *New York Times Co. v. United States*, 403 U.S. 713 (1971).

The Court of Appeals' method of analysis below was also implicitly rejected by this Court in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978):

> The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the restriction in issue] abridges expression that the First Amendment was meant to protect.

The Court thus made clear that the primary object of scrutiny under the First Amendment is expression, not the effect of restraints on parties to expression.

The District Court's gag order is constitutionally objectionable because it limited "the stock of information from which members of the public [could] draw," *Bellotti*, 435 U.S. at 783, about an event of undeniable public importance—"allegations of corruption by public officials in obtaining federal contracts." 842 F.2d at 607. App. 8a. The principal harm was not to lawyers, defendants, or the news media, but to the public at large, because it was deprived of information and opinion that was silenced by the order.

The impact of the Court of Appeals' approach is profound. Potential speakers are frequently unwilling or unable—for political, economic or practical reasons[7]—to seek to lift judicial

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7 *See, e.g., Kleindienst v. Mandel*, 408 U.S. 753 (1972) and *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (permitting challenges to restrictions on speech by potential recipients where potential speakers were forbidden to enter country, and were thus unable to mount challenge). *Virginia Pharmacy* was brought by consumers only after a challenge to the same statute by pharmacists was rejected by another district court, *Patterson Drug Co. v. Kingery*, 305 F. Supp. 821 (W.D.Va. 1969), and the pharmacists failed to appeal. *See Virginia Pharmacy, supra*, 425 U.S. at 753.

(footnote continued on next page)

restrictions on their speech. If potential recipients of speech do not have the power fully to litigate such restrictions, the content of these throttled communications will remain "frozen," lost to the public while they are current, meaningful and relevant.

B.

THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER A GAG ORDER ON TRIAL PARTICIPANTS MAY BE IMPOSED WITHOUT A FINDING THAT THERE IS A SERIOUS AND IMMINENT THREAT TO DEFENDANTS' RIGHT TO AN IMPARTIAL JURY.

1. The Appropriate Test for the Gag Order Was Whether There Was a Serious and Imminent Threat that the Prohibited Communications Would Foreclose a Fair Trial.

Every court in a criminal case is constitutionally required to assure the defendants' trial by an impartial jury. Unencumbered by direct authority from this Court, however, the District Court assumed virtually unfettered discretion to censor trial participants as an appropriate means to that end. Yet censorship, in this context as in others, is an extreme measure highly suspect under the Court's First Amendment jurisprudence. "[A]ny system of prior restraints of expression comes to this

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(footnote continued from previous page)

See also Barrows v. Jackson, 346 U.S. 249, 257 (1953) (rights of potential minority home-buyers permitted to be vindicated by white home-seller where it "would be difficult if not impossible for the persons whose rights are asserted to present their grievances before any court"); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (private school permitted to vindicate rights of parents not to send children to public schools).

In gag order cases, too, willing speakers are likely to be dissuaded by practical considerations from challenging the restraint. Prosecutors cannot be expected to contend for what may be portrayed as the right to "try defendants in the press." Similarly, defendants and their counsel may be loath to challenge an order unrelated to guilt or acquittal before the same judge who will be presiding over a trial at which their liberty and property will hang in the balance.

Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). *See also Nebraska Press Association v. Stuart*, 427 U.S. at 558; *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

Because potential recipients of speech challenged the gag order, the Court of Appeals below, like the District Court, applied a "reasonable likelihood" of prejudicial publicity test. Most federal courts of appeals that have reviewed gag orders, however, have employed prior restraint analysis. They have held that such orders are therefore appropriate only when defendants' rights are in imminent danger of being violated.

In *CBS Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975), the Sixth Circuit vacated a gag order on civil trial participants, holding: "To justify imposition of a prior restraint, the activity restrained must pose a clear and present danger, or serious and imminent threat to a protected competing interest." The gag order at issue was challenged by the media, not by the participants themselves.

A more recent Sixth Circuit case is strikingly similar to the case at bar. In *United States v. Ford*, 830 F.2d 596 (6th Cir. 1987), on motion of a criminal defendant, a Member of Congress, the court struck down a gag order prohibiting the defendant from making virtually any public statement about his prosecution. The court rejected the "likelihood" of prejudice test and held that the order was "a content based prior restraint on speech . . . that . . . therefore must meet the exacting 'clear and present danger' test for free speech cases enunciated in *Near v. Minnesota*, 283 U.S. 697 (1931)." *Id.* at 598.

> We see no legitimate reasons for a lower threshold standard for individuals, including defendants seeking to express themselves outside of court, than for the press. *See Pell v. Procunier*, 417 U.S. 817, 834-35 (1974) . . . .

* * *

> That the "clear and present danger" standard should apply to the District Court's "no discussion" order is reinforced by the divisive political context of this case. The protection of political speech which concerned the court in *Near* is at the core of the First Amendment.

Id. at 598, 600.

The Seventh Circuit employs a similar standard:

> [B]efore a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is "a serious and imminent threat to the administration of justice." *Craig v. Harney*, 331 U.S. 367, 373 . . . .

Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1970). *Cf. Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975) (same test adopted in a "subsequent punishment" situation).

The "serious and imminent threat" test also governs gag orders imposed on trial participants in the Ninth Circuit. *Levine v. District Court*, 764 F.2d 590, 596-98 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986).[8] *See also Journal Publishing Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986) (dissolving post-trial order by district court that prohibited jurors from speaking with the press, and holding, on petition of local newspaper, that such an order required finding of "clear and present danger to the administration of justice").

This Court should make clear that no test less stringent than these, certainly not the "reasonable likelihood" test employed by the courts below, sufficiently protects the First Amendment interests in permitting knowledgeable, interested and involved people to speak out about ongoing criminal proceedings.

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8 Without explanation or citation of authority, however, the Ninth Circuit, like the Court of Appeals below, did not treat gag orders as prior restraints when challenged by potential recipients of the forbidden speech in the related case of *Radio & Television News Association v. District Court*, 781 F.2d 1443, 1446 (9th Cir. 1986).

Authority from this Court in related contexts strongly supports that proposition.

The Court has ruled several times, for example, on contempt sanctions imposed for extrajudicial statements that allegedly interfered with the administration of justice. In those cases, the Court held that out-of-court publications and statements,

> were to be governed by the clear and present danger standard, described as "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."

Wood v. Georgia, 370 U.S. 375, 384 (1962), *quoting Bridges v. California*, 314 U.S. 252, 263 (1941). *Accord Craig v. Harney*, 331 U.S. 367, 376 (1947); *Pennekamp v. Florida*, 328 U.S. 331, 334 (1946).

In the context of press access to criminal proceedings, too, this Court has held that a "reasonable likelihood" test insufficiently protects First Amendment interests. In *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14-15 (1986), the Court held that forbidding press access to criminal pre-trial proceedings simply because it would create a "reasonable likelihood" of prejudice to a fair trial insufficiently vindicates the press' and public's First Amendment rights. The Court said, "The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [his right to an impartial jury]."

The approach employed by the Court of Appeals below does not take into account the preemptive nature of a prior restraint. It ignores the "freezing" impact of silencing informed opinion and information about a case replete with political overtones. It is contrary to this Court's prior restraint jurisprudence, which contains no exceptions to the "heavy burden" that must be met before a gag order will be imposed simply because it purports to protect another constitutional right.

Because a gag order is "the most serious and least tolerable infringement on First Amendment rights," *Nebraska Press*

Association, 427 U.S. at 559, it may not be employed unless absolutely necessary. *Cf. Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984). In this context, as the Sixth, Seventh and Ninth Circuits have recognized, necessity can be found only where the threat to Sixth Amendment rights to an impartial jury is "serious and imminent." *United States v. Ford*, *supra*; *Levine v. District Court*, *supra*; *CBS Inc. v. Young*, *supra*; *Chase v. Robson*, *supra*.

2. Applying the Correct Test, the Gag Order Was Unconstitutional.

The record before the District Court in this case utterly failed to support the entry of a gag order to ensure an impartial jury. Indeed, the fact that the courts below could enter and approve a blanket gag order on the facts before them underscores the danger of employing a test as broad, vague and forgiving as "reasonable likelihood" of prejudice. It demonstrates the need for this Court to adopt a standard that will not protect Sixth Amendment rights to an impartial jury at unnecessary cost to First Amendment interests in free speech.

The District Court, affirmed by the Court of Appeals, assumed that defendants' Sixth Amendment rights required the District Court to reduce the quantity of pre-trial news coverage. But this Court has repeatedly made clear that, because of the resources available to a trial judge to assure impartiality, the mere existence of publicity—even pervasive, spectacular publicity—does not necessarily abridge Sixth Amendment rights. *Nebraska Press Association*, 427 U.S. at 554. *See also Stroble v. California*, 343 U.S. 181 (1952) (news reports, including murder defendant's confession, descriptions of him as a "werewolf," a "fiend" and a "sex-mad killer," and district attorney's stated belief in his guilt, in light of six-week relative silence before trial, did not "arouse[ ] against [defendant] such prejudice in the community as to 'necessarily prevent a fair trial' . . . ."); *Murphy v. Florida*, 421 U.S. 794 (1975) (affirming conviction of celebrated jewel thief although every member of the jury had learned, through pre-trial publicity, of defendant's past crimes); *Beck v. Washington*, 369 U.S. 541, 556

(1962) (rejecting prejudicial publicity claim; "items were straight news stories rather than invidious articles which would tend to arouse ill will and vindictiveness").

As the Court explained in *Irvin v. Dowd*, 366 U.S. 717 (1961), pervasive publicity does not necessarily undermine a fair trial because the Sixth Amendment is concerned only with the impartiality of jurors:

> It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id. at 723, quoted with approval in *Dobbert v. Florida*, 432 U.S. 282, 302 (1977). *See also Chandler v. Florida*, 449 U.S. 560, 575 (1981) (televising of trial does not necessarily prejudice defendant's Sixth Amendment rights, so long as he cannot demonstrate in particular case that it "compromised the ability of the particular jury that heard the case to adjudicate fairly").

The Court faced similar claims in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). There, news organizations sought access to the transcript of a preliminary hearing in a criminal case. The Court dismissed the argument that secrecy was required to assure an impartial jury. "Through *voir dire*, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict." *Id.* at 15.

The proper Sixth Amendment inquiry was set forth in *Nebraska Press Association*:

> [O]n the record now before us it is not clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court.

427 U.S. at 569. A gag order, therefore, is inappropriate unless without it the court would be unable to impanel an impartial jury.

Measured against the facts of *Sheppard* and *Irvin*, where publicity required vacating the convictions, and *Murphy* and *Stroble*, where it did not, the publicity in this case was not pervasive. It was "prejudicial" only if the reporting of facts about a case and the views of its participants is, without more, prejudicial. There was no passionate editorializing on the defendants' guilt, no report of arguably inadmissible evidence, a confession, or prior criminal records. Neither was there any support in the record for any prediction that any such publications would occur absent the gag order. This case was not a "media circus"; no one suggested that it resembled a "carnival." There was nothing in the record to support the view that extrajudicial statements by counsel or defendants would, probably would, or were likely to, endanger the ability to seat an impartial jury.

Moreover, at the time of the gag order, trial was at least four months away. Defense counsel initially sought the ban on virtually all communications with the media not on the eve of trial, but at the very first court appearance, days after the indictment was handed down and after many self-serving public comments by the then sole-defendant (respondent Simon) and his counsel. To say the danger of actual prejudice to defendant's fair trial rights was imminent at that time was to ignore the obvious mellowing effect that time has on the impact of all news accounts.

The Court has recognized and relied on this ameliorative effect of time on pretrial news coverage. In *Stroble v. California*, 343 U.S. 181 (1952), the Court rejected defendant's Sixth Amendment claim because the storm of publicity surrounding his arrest and the release of his confession had occurred six weeks before his trial. *See also Murphy v. Florida*, 421 U.S. 794 (1975) (extensive publicity seven months before jury was selected did not interfere with right to fair trial); *Beck v. Washington*, 369 U.S. 541, 556 (1962) (publicity occurring largely five to nine and one-half months before trial held not prejudicial). *Also see Application of National Broadcasting Co.*, 635 F.2d 945, 953 (2d Cir. 1980) (granting press access to videotapes in Abscam prosecution and noting lack of potential juror awareness even of major scandals); *United States v. Pfingst*, 477 F.2d 177, 186 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973) (pretrial publicity not prejudicial where it occurred six months before trial, noting that "the memory of the public for such news is short"); and *United States v. Armone*, 363 F.2d 385, 389 (2d Cir.), *cert. denied*, 385 U.S. 957 (1966) (finding no prejudice and noting that, "Since the articles involved here were twelve weeks old at the time the jury was impanelled, it is highly unlikely that they were retained in the memories of the jurors").

Most recently, in *Seattle Times Co. v. District Court*, 845 F.2d 1513 (9th Cir. 1988), the Ninth Circuit ordered a district court to grant a newspaper access to documents filed in connection with a detention hearing in a "dramatic" case involving product tampering and murder. The Court of Appeals held that the specter of resulting pretrial publicity, even pervasive pretrial publicity, did not militate otherwise. It noted that prejudicial publicity is "less likely to endanger the defendant's rights to a fair trial in a large metropolitan area such as Seattle," and that "any prejudice is minimized because the disclosure will occur almost two months before the jury is scheduled to be impaneled." 845 F.2d at 1518, citing *Stroble v. California*, *supra*.

C.

THE COURT SHOULD GRANT CERTIORARI TO DECIDE THE PROPER ACCOMMODATION BETWEEN FIRST AND SIXTH AMENDMENT RIGHTS IN THE CONTEXT OF GAG ORDERS ON TRIAL PARTICIPANTS TO PREVENT COURTS FROM ENTERING ORDERS THAT UNNECESSARILY RESTRAIN CORE POLITICAL SPEECH, ARE ENTERED WITHOUT PRIOR EXPLORATION OF LESS RESTRICTIVE ALTERNATIVES AND ARE USED LARGELY FOR PURPOSES OTHER THAN PROTECTION OF DEFENDANTS' RIGHTS TO A FAIR TRIAL.

In *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), the Court addressed the accommodation between First and Sixth Amendment rights in the context of gag orders directed against the press. The Court held that the trial court's finding that "a clear and present danger that pre-trial publicity *could* impinge upon the defendant's right to a fair trial" was not sufficient to overcome the right of members of the press to be free from prior restraint. 427 U.S. at 563 (emphasis in this Court's opinion). But the Court has never decided the proper accommodation of First and Sixth Amendment rights with respect to restraints on the speech of defendants, defense counsel or prosecutors.

Without deciding this issue, however, the Court in *Sheppard v. Maxwell*, 384 U.S. at 359-63, adverted to the hypothetical use of gag orders on trial participants as an alternative to the "carnival" criminal trial; it made similar passing references in *Nebraska Press Association* itself. 427 U.S. at 549, 564. By not addressing the matter directly, the Court has left lower courts with only these brief dicta in *Sheppard* and *Nebraska Press Association* for guidance in considering the imposition of gag orders on trial participants. As exhibited in the opinions below, that dicta can be used to support nearly any restraint on such speech.

Because this Court has not decided the issues raised in this petition, the District Court, affirmed by the Court of Appeals,

entered a gag order, purportedly in reliance on dicta in *Sheppard*, that restricted core political speech, including that of an incumbent Congressman. It did so without exploring less restrictive alternatives. And it did so largely for purposes unrelated to the right of the defendants to a trial by an impartial jury.

1. The Order was Overbroad.

Unencumbered by any holding of this Court, the District Court, affirmed by the Court of Appeals, adopted an order of its own crafting that was unconstitutionally overbroad and suppressed "core political speech." *See United States v. Ford*, 830 F.2d 596, 600 (6th Cir. 1987). *See also Meyer v. Grant*, ____ U.S. ____, ____, ____, 108 S.Ct. 1886, 1892, 1894 (1988) (noting that the importance of First Amendment protections is 'at its zenith' in realm of 'core political speech'). Forbidden expression was not limited by the order to narrowly defined topics laden with the probability of prejudicial impact. Instead, the order set forth only four topics about which the defendants and counsel *were* allowed to speak.

As a result, hypothetically, the July 10 order forbade:

—the United States Attorney from responding publicly to the District Court's public accusation in its opinion that the Government had shamefully abused grand jury secrecy;

—the District Attorney of Bronx County from answering a reporter's inquiry about whether his office was still cooperating with the U.S. Attorney's Office in the Wedtech investigation;

—any of the defendants from publicly protesting their innocence;

—defendant Rep. Mario Biaggi, a Democrat, from suggesting publicly that this prosecution by officials in a Republican Administration was politically motivated, or even that the Attorney General, himself, should be prosecuted.

None of these forbidden statements could possibly have prejudiced defendants' rights, yet each was prohibited in the name of defendants' rights. Indeed, two motions for contempt are now pending against the Congressman's lawyer for making remarks banned by the order. By starting from the premise that all speech "concerning this case" was forbidden, 664 F. Supp. at 797, App. 48a, and then prescribing only some limited areas where speech was permissible, the District Court necessarily fashioned an order both broader and more restrictive than was required.

The District Court's decision to include defendants in the gag order has particularly grave First Amendment ramifications. Unlike their lawyers, the defendants are not officers of the court and do not "have a fiduciary obligation to maintain the integrity of the criminal process." *Cf.* American Bar Association, *Standards Relating to Fair Trial and Free Press* at 99 (1966).

Each defendant was presumed innocent and had been haled into court and put in jeopardy of his liberty and property very much against his will. Only in the most extraordinary and emergent situation would it have been proper also to deny his right to speak out about his treatment at the hands of law enforcement authorities. Especially is this so when political figures and elected officials, whose duty it is to voice opinions on public affairs, are silenced, as they were by the District Court. The record did not begin to support such a draconian curtailment of the ability of citizens and public officials to express publicly their grievances against the government.

2. The Courts Below Did Not Explore Less Restrictive Alternatives.

In the absence of direct authority from this Court, too, the District Court, affirmed by the Court of Appeals, did not employ, as it should have, alternatives or remedies less restrictive of First Amendment rights that would adequately have protected defendants' right to an impartial jury. The Court in *Nebraska Press Association*, *supra*, identified four alternatives

to prior restraints, the alternatives that in fact had been suggested by the Court years before in *Sheppard*: change of venue; postponement of the trial; searching *voir dire* of prospective jurors; and "emphatic and clear instructions" to the jury to ignore everything except the evidence heard in court. 427 U.S. at 463-64. The District Court never discussed a change of venue, and never stated why it would not be an adequate remedy. *See* Fed. R. Crim. P. 21(a).

The District Court declined to trust *voir dire* to ensure the selection of impartial jurors because it concluded that, without a gag order, everyone who had read a newspaper article or seen or heard a broadcast news report on the case might have to be excused. 664 F. Supp. at 793. App. 41a-42a. The court's conclusion was erroneous. The defendants' Sixth Amendment right was not to a jury composed of people entirely ignorant of the case, but to a group indifferent as to the defendants' guilt or innocence. *Nebraska Press Association*, 427 U.S. at 569; *Irvin v. Dowd*, 366 U.S. at 723. *Voir dire* is ordinarily sufficient to protect criminal defendants from adverse pre-trial publicity. *See Nebraska Press Association*, 427 U.S. at 548-54 (discussing the value, effectiveness, and long history of using *voir dire* to select impartial jurors in highly publicized cases). *See also Press-Enterprise Co. v. Superior Court*, 478 U.S. at 15 (proper use of *voir dire* will overcome prejudicial pretrial publicity).

Finally, the District Court rejected reliance upon strongly worded jury instructions to remind the jurors that only the evidence presented in court is relevant to their decision. The court apparently decided (without citation to authority) that, because such instructions "are not *always* an adequate remedy where a trial has been infested with extensive pretrial publicity," they would not be effective in this case. 664 F. Supp. at 794. App. 42a. (Emphasis added). Why instructions would not succeed with these defendants in this case was not explained.

3. The Order was Entered For Purposes Unrelated To Sixth Amendment Rights.

The District Court imposed a broad prior restraint to further purposes largely unrelated to the defendants' Sixth Amendment right to an impartial jury. Indeed, the District Court rejected less restrictive alternatives in substantial part because it concluded that they were inadequate to protect interests of the defendants entirely unrelated to this right. There is no warrant from the prior restraint jurisprudence of this Court for it to have done so.

The District Court was moved, for example, by its desire to enable "[d]efense counsel . . . to focus their attentions on trial preparation, rather than engaging in combative discourse with members of the press." 664 F. Supp. at 794. App. 43a-44a. There is no authority that would support issuance of a court order sharply abridging freedom of speech to protect trial participants from efforts by reporters to obtain interviews.

The District Court also issued the gag order in response to what it characterized as "a shameful abuse of grand jury secrecy." 664 F. Supp. at 792. App. 39a. It is difficult to understand, and the court did not explain, what impact alleged premature disclosure of grand jury proceedings in February, March and April 1987 could have had on its ability to seat an impartial jury in November or thereafter. This is not to say that the court was not required to guard grand jury secrecy, merely that no gag order was required for that purpose. Rule 6(e) of the Federal Rules of Criminal Procedure is already in place to deal with the issue. *See, e.g., In re Grand Jury Investigation (Lance)*, 610 F.2d 202 (5th Cir. 1980); *United States v. Myers*, 510 F. Supp. 323 (E.D.N.Y. 1980). Since grand jury secrecy is already protected by law and violations already punishable by contempt, the gag order, insofar as it also sought to assure grand jury secrecy and was also punishable by contempt, was

duplicative and unnecessary.[9] An unnecessary prior restraint cannot be countenanced under any reading of the decisions of this Court.

In addition to its reaction to alleged breaches of grand jury secrecy, the District Court was also concerned about the possibility of "lingering notions about an acquitted defendant's character, and even his innocence" resulting from "publicity . . . accompanying his indictment and the early stages of trial." 664 F. Supp. at 789 n.13. App. 34a. The court also assumed a responsibility to protect the defendants' privacy. 664 F. Supp. at 794. App. 44a. Petitioners are aware of no authority for the proposition that a court may, consistent with the First Amendment, enter a gag order for such reasons or that prior restraints are permissible tools for achieving such ends.

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9 It is also noteworthy that Rule 6(e) specifically provides that "[n]o obligation of [grand jury] secrecy may be imposed on any person except in accordance with this rule."

CONCLUSION

The District Court below was so intent on protecting the orderliness of the criminal proceedings before it that it ignored the free speech rights of trial participants in the case. It could do so only in the absence of guidance from this Court as to the accommodations between First and Sixth Amendment rights in this frequently recurring context. Petitioners therefore respectfully request that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit to review the judgment rendered by that court in this case, and set these important questions for plenary consideration.

Dated: August 4, 1988

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Argued Sept. 16, 1987 Decided March 14, 1988

No. 322, Docket 87-7644

IN RE APPLICATION OF DOW JONES & COMPANY, INC., THE NEW YORK TIMES COMPANY, CBS INC., NATIONAL BROADCASTING COMPANY, INC., NEW YORK NEWS INC., THE ASSOCIATED PRESS, and NEWSDAY, INC.,

Applicants.

APPEAL OF DOW JONES & COMPANY, INC., THE NEW YORK TIMES COMPANY, CBS INC., NATIONAL BROADCASTING COMPANY, INC., THE ASSOCIATED PRESS, and NEWSDAY, INC.,

Applicants-Appellants.

UNITED STATES OF AMERICA,

v.

STANLEY SIMON, MARIO BIAGGI, PETER NEGLIA, JOHN MARIOTTA, BERNARD EHRLICH, RICHARD BIAGGI and RONALD BETSO,

Defendants,

STANLEY SIMON, PETER NEGLIA, JOHN MARIOTTA, BERNARD EHRLICH, and RICHARD BIAGGI,

Defendants-Appellees.

Robert D. Sack, New York City (Mitchell A. Karlan, Richard J. Tofel, Stuart D. Karle, Gibson, Dunn & Crutcher, New York City, of counsel), *for applicant-appellant Dow Jones & Co., Inc.*

Deborah R. Linfield, George Freeman, The New York Times Co., Douglas P. Jacobs, CBS Inc., Roberta R. Brackman, Nat. Broadcasting Co., Inc., Nancy A. Brown, Rogers & Wells for The Associated Press, Robert Lloyd Raskopf, Harry Walters, Townley & Updike, New York City, for Newsday, Inc., of counsel, *on the brief for applicants-appellants.*

Maurice N. Nessen, New York City (Cecilia Loving-Sloane, David Z. Seide, Kramer, Levin, Nessen, Kamin & Frankel, New York City, of counsel), *for defendant-appellee Stanley Simon.*

Arthur Eisenberg, New York City, *on brief for amicus curiae New York Civ. Liberties Union.*

Before

CARDAMONE, WINTER and MINER,

Circuit Judges.

CARDAMONE, *Circuit Judge*:

This is an appeal by news agencies from an order restraining trial participants in a criminal case from speaking with the press. Appellants urge that secrecy of the sort imposed by this "gag" order seriously compromises the right of the press to publish. In this case the district court was faced with what it described as a "shameful abuse of grand jury secrecy," which it concluded was reasonably likely to influence the outcome of defendants' trial. Because it is the obligation of the federal courts to ensure that a defendant receive a fair trial by an impartial jury, the district court entered the subject restraining order upon finding that this case is a "widely publicized or sensational" one within the meaning of Local Criminal Rule 7(c), which authorizes such an order when "extrajudicial statements by parties and witnesses" are likely to interfere with that right. We affirm.

BACKGROUND

Dow Jones & Company, The New York Times Company, CBS Inc., National Broadcasting Company, Inc., The Associated Press, and Newsday (collectively, "news agencies" or "appellants") appeal from the subject restraining order entered in the United States District Court for the Southern District of New York (Cannella, J.) on July 10, 1987, which denied their motion to vacate an earlier order entered in the district court on April 23, 1987, and from an order of the district court (Motley, J.) dated July 27, 1987 that denied a motion to vacate the July 10 order. The news agencies ask us to vacate the July 10 order that modified the April 23 order and reverse the decision under which the order was entered, *United States v. Simon*, 664 F. Supp. 780 (S.D.N.Y. 1987).

The *Simon* case stems from a wide-ranging investigation into the affairs of Wedtech, a South Bronx, New York military contractor that is charged with fraudulently qualifying for "no-bid" federal contracts set aside for minority-owned companies. The investigation led to the April 1, 1987 indictment of Stanley Simon, former Bronx Borough President, on six counts of extortion, obstruction of justice, perjury, and tax evasion. On June 3, 1987 a superseding indictment charged Simon and six additional defendants with violating the federal racketeering statute (RICO) based on their participation in bribery and other crimes committed in connection with Wedtech's activities. The six other defendants are Mario Biaggi, U.S. Congressman from the Bronx; his son, Richard Biaggi, a member of the Congressman's former law firm, Biaggi & Ehrlich; General Bernard Ehrlich, partner in that law firm; Peter Neglia, former New York regional Director of the U.S. Small Business Administration; John Mariotta, cofounder of Wedtech, formerly its chief executive officer, chairman of its Board, and principal stockholder; and Ronald Betso, holder of an option to purchase 20,000 shares of Wedtech stock allegedly placed in Betso's name for defendant Neglia. Each defendant is accused of having benefitted financially from the criminal activities of Wedtech; Simon, Mario Biaggi, and Neglia are also charged with having misused their public offices on its behalf. All the defen-

dants except Mario Biaggi and Betso are appellees on this appeal. In addition to state and federal investigations, two congressional committees are examining the affairs of individuals connected with Wedtech.

The record reflects a plethora of publicity concerning the Wedtech investigation since October 1986. From then until the April 1, 1987 indictment, articles appeared in all of the region's major newspapers detailing the joint federal-state investigation and the grand jury proceedings relating to Stanley Simon. Although the attribution to sources and the facts vary in their specificity, and perhaps accuracy, the net effect clearly translated secret grand jury proceedings into matters of public knowledge. In late May 1987, news articles again described in detail the targets, charges, negotiations, and timing of the superseding June 3 indictment. The news stories revealed what was being investigated, what the grand jury was hearing, what witnesses were being called or about to be called, and what they would say. This apparently accurate information was often ascribed to "law enforcement sources," "law enforcement officials," and "prosecutors."

In these and other flurries of publicity, the prosecutors, defendants, and defense counsel participated in the escalating publicity duels. As a result, on April 10, 1987—nine days after the original indictment was filed against Stanley Simon—his defense counsel orally proposed in open court before Judge Cannella that the parties agree to a "gag" order restraining extrajudicial speech by all trial participants. Simon's counsel asserted that media publicity resulting from state and federal prosecutors' violation of grand jury secrecy required a blanket order to insure that his client received a fair trial. At first the government concurred orally in the proposed stipulated order, but later in a letter addressed to the court stated that the prosecution opposed extension of Rule 7 of the Criminal Rules of the Southern District of New York (Local Rule 7), which limits out-of-court statements by prosecutors and defense attorneys.

On April 23, 1987 the district court nonetheless entered a broad restraining order directed to the prosecutors, defendants, and defense counsel. The news agencies were not named in the April 23 order, which remained in effect—apart from a court-

approved press conference held on June 3, 1987 to announce the six additional indictments—until entry of the July 10 order that is the subject of this appeal.

On June 12, 1987, at the news agencies' request, the district court heard oral arguments as to whether the broad April 23 order should be continued. Five defendants supported its continuance, two defendants (including Mario Biaggi) took no position, and the government and news agencies argued that it should be vacated. On July 10 the district court modified its April 23 order so that it provides

> ORDERED, that the United States Attorney and the District Attorney for Bronx County, their representatives and agents, defendants Stanley Simon, Mario Biaggi, John Mariotta, Peter Neglia, Bernard Ehrlich, Richard Biaggi and Ronald Betso, and their counsel and representatives SHALL NOT MAKE ANY extrajudicial statement concerning this case (1) to any person associated with a public communications media, or (2) that a reasonable person would expect to be communicated to a public communications media, except that nothing in this Order shall prohibit any individual from:
>
> (A) Stating, without elaboration or characterization—
>
> (1) the general nature of an allegation or defense;
>
> (2) information contained in the public record;
>
> (3) the scheduling or result of any step in the proceedings; or
>
> (B) Explaining, without characterization, the contents or substance of any motion or step in the proceedings, to the extent such motion or step is a matter of public record.
>
> This Order supersedes all previous orders.

As appears from its terms, this order does not impinge on the full reporting of courtroom and other public proceedings. It prohibits virtually all other extrajudicial speech relating to the pending Wedtech case. On July 27, 1987 Judge Motley—newly

assigned to the expanded criminal matter as a result of the superseding indictments—denied the news agencies' motion that she reconsider and vacate Judge Cannella's July 10 order. The news agencies appeal from the July 10 gag order and from the July 27 order that denied the motion to vacate it. We expedited the appeal from these orders.

DISCUSSION

I *Standing*

The threshold question presented is whether the news agencies have standing to bring this appeal even though they are neither named in nor restrained by the order. In order for appellants to maintain their appeal the requirements of Article III of the constitution as well as judicially imposed prudential requirements must be satisfied, *see Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 2204, 45 L.Ed.2d 343 (1975); *Flast v. Cohen*, 392 U.S. 83, 97, 88 S.Ct. 1942, 1951, 20 L.Ed.2d 947 (1968). Federal judicial power is limited to the adjudication of "legal rights of litigants in actual controversies." *Liverpool, N.Y. & Phil. S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885). The defendants in the underlying criminal case contend that the news agencies—as non-parties to the criminal proceedings and as sole challengers to the July 10 restraining order—do not present a sufficiently concrete "case" or "controversy" to satisfy the standing requirements.

To have standing, a party must allege (1) a personal injury in fact, (2) a violation of his or her own, not a third-party's rights, (3) that the injury falls within the zone of interests protected by the constitutional guarantee involved, (4) that the injury is traceable to the challenged act, and (5) that the courts can grant redress for the injury. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472-74, 102 S. Ct. 752, 758-59, 70 L.Ed.2d 700 (1982). Defendants argue that the news agencies fail to meet the first three requirements.

To satisfy the critical constitutional test of personal injury in fact, the Supreme Court instructs that the injury or threat of

injury must be "distinct and palpable," *Warth*, 422 U.S. at 501, 95 S.Ct. at 2206, and "concrete," *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221, 94 S.Ct. 2925, 2932, 41 L.Ed.2d 706 (1974). The litigant must be "immediately in danger," *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923)), and the injury must be "direct," *Ex parte LeVitt*, 302 U.S. 633, 634, 58 S.Ct. 1, 82 L.Ed. 493 (1937) (per curiam). Some injury in the future is not enough; the harm must be "real and immediate," not "conjectural" or hypothetical, *Golden v. Zwickler*, 394 U.S. 103, 109, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969).

The news companies argue they have standing—satisfying all the above tests—because the "zone" of First Amendment protection extends to a "recipient's right" to hear speech from unrestrained prosecutors and defendants. Defendants respond to this argument by stating that the possibility that in the future hypothetical speakers may exist does not constitute injury in fact. They claim that not only does that proposition violate the constitutional requirement of injury in fact, but it runs afoul of the prudential rule that to have standing one must assert his or her own rights, not another's rights. Relying on *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 80, 98 S.Ct. 2620, 2634, 57 L.Ed 2d 595 (1978), defendants conclude that because neither the government nor the defendants have appealed the restraining order, appellants' news agencies lack standing to do it for them.

Defendants' argument in theory has a patina of plausibility. But the rights of potential recipients of speech, like the news agencies, to challenge the abridgment of that speech has already been decided. The Supreme Court in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), held that consumers of prescription drugs have standing to challenge state restrictions on drug price advertising by licensed retail pharmacists. The Court reasoned that "where a [willing] speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both." *Id.* at 756, 96 S.Ct. at 1823. This "reciprocal right to receive" the protected speech—the

commercial advertising—"may be asserted" by the recipients. *Id.* at 757, 96 S.Ct. at 1823. The corollary to the guarantee of free speech is that "there be full opportunity for everyone to receive the message." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 76, 96 S.Ct. 2440, 2455, 49 L.Ed.2d 310 (1976) (Powell, J. concurring).

First Amendment protection for recipients of speech extends to a wide variety of contexts. *Virginia State Bd.* at 756-57, 96 S.Ct. at 1823; *see Procunier v. Martinez*, 416 U.S. 396, 408-09, 94 S.Ct. 1800, ____, 40 L.Ed.2d 224 (1974) (censorship of prison inmates' mail infringed the rights of noninmates to whom mail was addressed); *Kleindienst v. Mandel*, 408 U.S. 753, 762-65, 92 S.Ct. 2576, 2581-82, 33 L.Ed.2d 683 (1972) (American scholars have right to hear, speak, and debate alien Belgium Marxian theoretician with no personal entry right); *Red Lion Broadcastng Co. v. FCC*, 395 U.S. 367, 386-90, 89 S.Ct. 1794, 1804-06, 23 L.Ed.2d 371 (1969) (public has right to receive suitable access to social, political, esthetic, moral and other ideas through broadcast media); *Stanley v. Georgia* 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969) (right to receive information and ideas extends to possession of obscene materials in one's own home); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965) (citizens have First Amendment right to receive communist political publications from abroad). Throughout all these cases the First Amendment unwaveringly protects the right to receive information and ideas. A challenge by news agencies must certainly be permitted when the restrained speech, as here, concerns allegations of corruption by public officials in obtaining federal contracts.

Whether the news agencies are actually potential receivers of otherwise restrained speech must then be considered. The record clearly supports the district court's conclusion that the news agencies are in fact potential recipients of speech by the prosecutors, defense counsel, and the defendants in the underlying Wedtech case. The district judge recognized that there had been extensive—pre-restraining order—extrajudicial statements by all these individuals. Plainly, a group of attorneys let loose to speak on Wedtech's activities would add to an already rampant

flood of out-of-court publicity. It is hard, in fact, to imagine that there are no willing speakers. Without them there would be no need for a restraining order; it would be superfluous.

That the United States Attorney opposed the April 23 and July 10 orders—but declined to join in this appeal—does not suggest that absent the restraining order the government also is not a willing speaker. Its position has been that as prosecutor it is bound by the existing federal rules and local rules of criminal procedure, by the Code of Professional Responsibility, and by internal Justice Department regulations. Within these limitations on what federal prosecutors may divulge, there is no indication that government prosecutors are not willing speakers. Additionally, whether or not defendants and their counsel desire media coverage, the record reveals that were they not restrained, such persons would also be willing speakers. These findings by the district court as to the willingness of the various individuals to speak are not clearly erroneous.

Hence, we hold that the news agencies have standing to appeal Judge Cannella's order restraining speech of the trial participants. Because we hold that the news agencies have standing as recipients of speech to prosecute this appeal, it is not necessary to address whether applicants' status as news gatherers also affords them standing.

II *Is the Order a Prior Restraint?*

The news agencies portray the July 10 order as a classic prior restraint on the press. We disagree. The trial participants' right to freedom of speech, as *Virginia State Board of Pharmacy* teaches, necessarily and logically protects the news agencies' right to receive that speech. *See* 425 U.S. at 757, 96 S.Ct. at 1823. It is that right to receive speech that affords standing to the press to maintain this action. But, when considering the merits, the press' right to receive speech does not enlarge the rights of those directly subject to the restraining order. Success on the merits for the news agencies is entirely derivative of the rights of the trial participants to speak. For this reason we undertake a careful evaluation of the July 10 order directed at trial participants, but challenged by the press.

To determine if the July 10 order is a prior restraint, we analyze its operation and effect in the particular circumstances of this case. *See Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441-42, 77 S.Ct. 1325, 1327-28, 1 L.Ed.2d 1469 (1957) (a "pragmatic assessment" of a statute's operation in "particular circumstances" determines if it is a prior restraint). To begin, there is a substantial difference between a restraining order directed against the press—a form of censorship which the First Amendment sought to abolish from these shores—and the order here directed solely against trial participants and challenged only by the press. The distinction is critical.

The most offensive aspect of a prior restraint is the censorship involved by forbidding the dissemination of information already known to the press and therefore public. A prior restraint deprives the public of specific news because it prevents publication. Although the restraining order in this case limits the flow of information readily available to the news agencies—and for that reason might have an effect similar to that of a prior restraint—the fact that the order is not directed at the news agencies and that they therefore cannot be haled into court for violating its terms deflates what would otherwise be a serious concern regarding judicial censorship of the press. For this reason the order is considerably less intrusive of First Amendment rights than one directly aimed at the press.

The Ninth Circuit has drawn the distinction between restraining orders directed at trial participants challenged by the press and those challenged by trial participants. *Compare Radio & Television News Ass'n v. United States Dist. Court for the Cent. Dist.*, 781 F.2d 1443, 1446 (9th Cir.1986) (restraining order not directed at the press does not restrain press' First Amendment rights) *with Levine v. United States Dist. Court for the Cent. Dist.*, 764 F.2d 590, 595 (9th Cir.1985) ("the district court's order is properly characterized as a prior restraint" on counsel's First Amendment right to free speech), *cert. denied*, 476 U.S. 1158, 106 S.Ct. 2276, 90 L.Ed.2d 719 (1986). The Sixth Circuit takes a different view. In a civil suit arising from the aftermath of the Kent State shootings, a media company challenged the restraining order directed only to parties, counsel, and their agents. *CBS v. Young*, 522 F.2d 234 (6th Cir.

1975). In *Young*, the court held that "the conclusion is inevitable that [the restraining order] constitutes a prior direct restraint upon freedom of expression." *Id.* at 239. Adopting this view ignores the fact that the defendants here requested the order and urge its affirmance. Thus, we conclude that there is a fundamental difference between a gag order challenged by the individual gagged and one challenged by a third party; an order objected to by the former is properly characterized as a prior restraint, one opposed solely by the latter is not.

Here nothing prevented the restrained parties in the present litigation from challenging the July 10 order. Hence, despite their unquestioned standing to maintain this appeal, the news agencies may not assert defendants' First Amendment rights when defendants refuse to challenge that infringement themselves. *See Radio & Television News Ass'n*, 781 F.2d at 1448 ("The RTNA lacks standing to assert the free speech constitutional rights of the non-party trial counsel in challenging this order."). For the reasons stated the July 10 order may not therefore be characterized as a prior restraint on the news agencies as appellants.

III *Justification for the Order*

To conclude that this is not a case of prior restraint of the press is not to say that the restraining order need not be justified. On the contrary, it must be. The impact of the subject order implicates press freedom, even though it does so indirectly. There is tension between the media's First Amendment right to publish and an accused person's Sixth Amendment right to a fair trial before an impartial jury.

Each right is crucial to the maintenance of a free society. Without freedom of the press a free society will not long endure. A free press is particularly important when public officials face criminal charges relating to their use of office. Although often appearing unfair in the eyes of the public, pretrial publicity, "even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554, 96 S.Ct. 2791, 2800, 49 L.Ed.2d 683 (1976). It should not be overlooked that a jury need not consist

of persons entirely ignorant of the case they are about to hear, all that the Constitution requires is a jury that is impartial, one that is capable of fairly deciding on the evidence before it whether defendants are innocent or guilty. *See Sheppard v. Maxwell*, 384 U.S. 333, 351, 86 S.Ct. 1507, 1516, 16 L.Ed.2d 600 (1966); *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961).

At the same time the proper administration of criminal justice must protect an accused's Sixth Amendment rights. "[T]he theory of our system" as Justice Holmes explained 80 years ago, "is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado*, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907). Aware of this inherent tension between freedom of the press and the right to trial by an impartial jury, the framers of our Constitution did not assign priorities between them. *See Nebraska Press*, 427 U.S. at 547, 561, 96 S.Ct. at 2803. When the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nonetheless yield to the latter. *See Pennekamp v. Florida*, 328 U.S. 331, 347, 66 S.Ct. 1029, 1037, 90 L.Ed. 1295 (1946) ("Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.").

To adjust the conflict between competing constitutional values, prophylactic measures are preferred over remedial ones. *See Nebraska Press*, 427 U.S. at 555, 96 S.Ct. at 2801 (relying on reversals for failure to afford a fair trial can exact high costs on society and the accused, including justice delayed, impossible retrials, and injustice unredressed). The preventive task is complex because it involves determining whether there exists a sufficient threat to an impartial trial to justify a restraint on speech.

A. The Legal Standard

To decide whether the pretrial publicity justified the order, the standard by which to measure justification is whether there

is a "reasonable likelihood" that pretrial publicity will prejudice a fair trial. *See Sheppard v. Maxwell*, 384 U.S. at 363, 86 S.Ct. at 1522. The Local Criminal Rules for the Southern District of New York concerning extrajudicial speech also adopt a "reasonable likelihood" standard. As a direct result of the "Free Press—Fair Trial Report" of 1968, *reprinted in* 45 F.R.D. 391, 404 (1968), Local Rule 7(a) prohibits counsel from releasing any information "if there is a reasonable likelihood that such dissemination will interfere with a fair trial. . . ." S.D.N.Y.Crim.R 7(a). The nature and extent of the pretrial news coverage in this case must be examined to see if the pretrial publicity in the light of that standard posed such a threat to defendants' Sixth Amendment rights as to justify the July 10 restraining order.

B. The Standard Applied

As noted, Wedtech's affairs and the activities of those associated with it have generated state, federal, and congressional investigations, encompassing local, state, and federal officials including, among others, the Attorney General of the United States. When Simon's defense counsel requested a broad restraining order on April 17, 1987 he detailed what he considered serious violations of grand jury secrecy rules that had occurred from the beginning of the investigation of Stanley Simon until the announcement of his indictment on April 1. Defense counsel believed that prosecutors had violated the grand jury secrecy provisions of Fed.R.Crim.P. 6(e), and in his affidavit he charged that the Southern District United States Attorney and the Bronx County District Attorney revealed prejudicial material at the press conference announcing Simon's indictment. He asked the district court to protect against further abuse of the judicial process until the defense could present a motion addressed to the government's violation of Rule 6(e). It was on this basis that Judge Cannella issued the restraining order of April 23, 1987.

Subsequently, on May 28, 1987 defense counsel made a motion for an evidentiary hearing and sanctions pursuant to Fed.R.Crim.P. 42(b) (criminal contempt) and 18 U.S.C.

§ 401(3)(1982) (power of courts to punish contempt) for government violations of the April 23 order. The accompanying affidavit asserted that news articles, attributed to government sources, "identify the people who will be included in superseding indictments in this case, speak of the content of the indictments that will be handed down and detail negotiations between attorneys for the government and those who will be indicted."

At the same time that defense counsel moved for contempt proceedings, the United States Attorney requested and was granted modification of the April 23 restraining order in order to announce the subsequent indictments of the other six defendants. About a week later Judge Cannella stated that the April 23 order applied in full to all trial participants and their counsel including those named in the superseding indictment of June 3. On June 8 the news media challenged the restraining order as an unconstitutional prior restraint. On June 12 the district court held a hearing to consider extending or modifying the April 23 order, at which the government asserted that it was not in contempt of the April 23 order—as alleged by defense counsel on May 23—and that federal prosecutors had not violated either Federal Rule 6(e) or Local Rule 7. The district court deferred ruling on the defense contempt motion until the conclusion of the trial.

The district court found that extensive publicity had predated Stanley Simon's April indictment. After the indictment, there was massive publicity concerning the targets of the ongoing grand jury investigation, accompanied by what the district court described as a "shameful abuse of grand jury secrecy." This abuse included leaking to the media the identities and testimony of grand jury witnesses. Despite the district court's restraining order of April 23, this sort of publicity and the grand jury "leaks" continued up until the return of the superseding indictment on June 3.

Obviously, this case is not an isolated instance of prejudicial pretrial publicity. An Ad Hoc Committee of the Association of the Bar of the City of New York has found an upsurge in the use of media by lawyers in connection with pending investigations and indictments, noting that prosecutors appear on television announcing and discussing indictments, and attorneys for

the accused wage contests in the press. *Report of the Ad Hoc Committee on Pretrial Publicity 3* (Ass'n of the Bar of the City of New York, 1987) (*Ad Hoc Committee Report*). Yet Ethical Consideration 7-25 of New York's Code of Professional Responsibility states that "a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider." N.Y.Jud.Law EC 7-25 (McKinney 1975). The Ad Hoc Committee on Pretrial Publicity was concerned with lawyers outside the courtroom deliberately embarrassing other persons when ethical constraints admonish against doing so within. *Ad Hoc Committee Report* at 6. It was further concerned by lawyers airing matters in the press that are inadmissible at trial. *Id.*

Several policy concerns militate strongly in favor of maintaining the secrecy of grand jury proceedings. Otherwise, targets learning of their possible indictment might flee or tamper with grand jury witnesses. Witnesses would be less willing to appear and testify for fear of reprisal. Not the least important consideration is to protect the good name and reputation of those investigated, but not indicted, by the grand jury. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219, 99 S.Ct. 1667, 1672, 60 L.Ed.2d 156 (1979).

Based upon the sensational public nature of the case and the leaks of grand jury information, the district court found that failure to restrain the trial participants would add "fuel to an already voracious fire of publicity" and create "a real and substantial likelihood that some, if not all, defendants might be deprived of a fair trial." We are unable to say upon reviewing this record that the findings relied upon by the district court to support that conclusion are clearly erroneous. Consequently, the district court was justified in considering the imposition of a "gag" order on trial participants.

IV *Consideration of Less Restrictive Alternatives*

As the district judge properly recognized, before entering an injunction against speech he had to explore whether other available remedies would effectively mitigate the prejudicial publicity. *See Nebraska Press*, 427 U.S. at 562, 96 S.Ct. at 2804. The mitigating measures, derived from the Supreme Court's discussion in *Sheppard v. Maxwell*, 384 U.S. at 358-63, 86 S.Ct. at 1519-22, include change of venue, trial postponement, a searching voir dire, emphatic jury instructions, and sequestration of jurors. *See Nebraska Press*, 427 U.S. at 563-64, 96 S.Ct. at 2804-05. These precautions are like words to a writer, *see* L. Wittgenstein, *Philosophical Investigations* ¶¶ 11-14 (G.E.M. Anscombe trans. 3d ed. 1958). Each is a different tool which, depending on the context in which it is used, provides a different effect. The precautions share one thing in common: each must be explored and ultimately rejected as inadequate—individually and in combination—as a remedy for prejudicial pretrial publicity before a restraining order is entered. Some combination of preventive measures short of a restraining order usually achieves this goal.[1]

But in this case the district court carefully considered and found the use of these other measures unable to stop the grand jury leaks and the publicity prejudicial to defendants' rights that came from it. We concur in the district court's perceptions and its prediction that the only effective recourse available was the use of a restraining order.

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1 In addition to considering the amount of pretrial publicity and the availability of alternative remedies, *Nebraska Press* indicates that an analysis of the effectiveness of the order in question is a necessary consideration. The effectiveness of the restraining order here does not affect the validity of the order, as it did in *Nebraska Press*, where the order was limited geographically and jurisdictionally. There, outside press could report fully on any information obtained from anyone. Here, in contrast, the restraining order being directed at trial participants is undisputably effective. In this sense, no lack of efficiency of the restraining order weighs against its imposition, as was the case in *Nebraska Press*. On the other hand, devising the most effective preventive measure is not the proper goal. Rather, the goal is to craft measures to ensure an impartial jury without restricting First Amendment rights any further than absolutely necessary.

CONCLUSION

While the right of the press to publish should be compromised as little as possible, "trial by newspapers," as Justice Frankfurter observed, too often differs from the real trial in court and it is the defendant who suffers the "distorted consequences." *Pennekamp v. Florida*, 328 U.S. at 361, 363, 66 S.Ct. at 1045 (Frankfurter, J. concurring). The problem begins not with the publishing of news by a free press, but with a hemorrhage of small leaks of secret grand jury information released to the media. This leads directly to prosecutor and defense counsel inciting trial by the press. It is altogether fitting that the solution should restrict those at the source of the problem: counsel who serve as officers of the court, a body which has a duty to insure that the accused receives an impartial trial. A focus on the source of potentially prejudicial statements rather than the publisher of such statements has been endorsed by the courts and also by committees that addressed specifically the fair trial-free press issue. *See Ad Hoc Committee Report* at 7-14 (recommending amendments to the New York Code of Professional Responsibility to curb potential extrajudicial speech abuses).

Accordingly, for the reasons stated the order appealed from is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 87-7644

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of March one thousand nine hundred and eighty-eight.

Present:

HON. RICHARD J. CARDAMONE,
HON. RALPH K. WINTER,
HON. ROGER J. MINER,

Circuit Judges.

IN RE APPLICATION OF

DOW JONES & COMPANY, INC., THE NEW YORK TIMES COMPANY, CBS INC., NATIONAL BROADCASTING COMPANY, INC., NEW YORK NEWS INC., THE ASSOCIATED PRESS, and NEWSDAY, INC.,

Applicants,

DOW JONES & COMPANY, INC., THE NEW YORK TIMES COMPANY, CBS INC., NATIONAL BROADCASTING COMPANY, INC., THE ASSOCIATED PRESS, and NEWSDAY, INC.,

Applicants-Appellants,

UNITED STATES OF AMERICA,

—v.—

STANLEY SIMON, MARIO BIAGGI, PETER NEGLIA, JOHN MARIOTTA, BERNARD EHRLICH, RICHARD BIAGGI and RONALD BETSO,

Defendants,

STANLEY SIMON, PETER NEGLIA, JOHN MARIOTTA, BERNARD EHRLICH and RICHARD BIAGGI,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

Elaine B. Goldsmith,
Clerk

By /s/ EDWARD J. GUARDARO
Edward J. Guardaro,
Deputy Clerk

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. S 87 Cr. 265 (JMC)

July 10, 1987

UNITED STATES OF AMERICA,

—v.—

STANLEY SIMON, MARIO BIAGGI, PETER NEGLIA, JOHN MARIOTTA, BERNARD EHRLICH, RICHARD BIAGGI and RONALD BETSO,

Defendants.

Robert D. Sack, Mitchell A. Karlan and Richard J. Tofel, Gibson, Dunn & Crutcher, New York City, *for Dow Jones & Co., Inc.*

Robert L. Raskopf, Townley & Updike, New York City, *for Newsday, Inc.*

Deborah R. Linfield, New York City, *for New York Times Co.*

Douglas P. Jacobs, New York City, *for CBS, Inc.*

Roberta Brackman, New York City, *for Nat. Broadcasting Co., Inc.*

Marjorie T. Coleman and Theodore Hadjiparaskevas, New York City, *for New York News, Inc.*

Nancy Brown and David Schultz, Rogers & Wells, New York City, *for Associated Press.*

Rudolph W. Giuliani, U.S. Atty., and Mary T. Shannon, Asst. U.S. Atty., *for the U.S.*

Maurice N. Nessen and David Z. Seide, Kramer, Levin, Nessen, Kamin & Frankel, New York City, *for Stanley Simon.*

Barry I. Slotnick, Slotnick & Baker, New York City, *for Mario Biaggi.*

Kevin P. McGovern, Brooklyn, N.Y., *for Peter Neglia.*

Jeffrey Glekel, Skadden, Arps, Slate, Meagher & Flom, New York City, *for John Mariotta.*

Peter Driscoll, Kostelanetz & Ritholz, New York City, *for Bernard Ehrlich.*

Dominic Amorosa, New York City, *for Richard Biaggi.*

Alan Kaufman, Buchwald & Kaufman, New York City, *for Ronald Betso.*

New York Civil Liberties Union, Arthur Eisenberg, New York City, *for amicus curiae.*

MEMORANDUM & ORDER

CANNELLA, *Senior District Judge*:

Before the Court is an application by Dow Jones & Company, Inc., The New York Times Company, CBS, Inc., National Broadcasting Company, Inc., New York News Inc., The Associated Press and Newsday, Inc. ["applicants"] to vacate this Court's Order of April 23, 1987 ["April 23 Order" or "Order"]. As it now stands, the Order directs defendants, their counsel, the United States Attorney and his representatives to respond to inquiries from the public communications media with the statement "No comment," or "Whatever we have to say will be said or has been said in court."[1]

A brief history of the events leading up to the April 23 order will assist the reader in placing the instant application in proper context. On April 1, 1987, former Bronx Borough President Stanley Simon was indicted on six counts of extortion, obstruction of justice, perjury and tax evasion. The charges stemmed from the ever-burgeoning investigation of the Wedtech Corpo-

1 A copy of the April 23 Order is attached to this Memorandum and Order as an Appendix.

ration ["Wedtech"]. At a pretrial conference held on April 10, the Court established tentative discovery and trial dates. Maurice Nessen, Esq., counsel for Stanley Simon, then read into the record the contents of a letter he had sent to the United States Attorney.[2] The letter spelled out the terms of a proposed stipulation regarding extrajudicial statements. After the letter had been read, the Court asked whether the Government would have any difficulty with the terms of the stipulation. The United States Attorney responded in the negative.[3] Following these dis-

2 Mr. Nessen read the contents of a letter addressed to Assistant United States Attorney Mary T. Shannon:

> "As I said in my telephone conservation just a while back today, I should like you and [United States Attorney Rudolph Giuliani] to agree to an interim lawyer's agreement to be spelled out to the Court tomorrow for its approval. . . .
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> "The Government, or any organization of people associated with the that is [sic] collectively the Government, and the defendant and all his representatives, . . . shall not, until the court rules on a motion to be addressed to pretrial publicity under Rule 7(c) of the Criminal Rules of the Southern District and Eastern District . . . make any extrajudicial statement to any person associated with the public communications media or to any person to whom they would reasonably expect to communicate any statement to public communications media in regard to this case, the indictment or any proposed or actual superseding indictment or any facts relating to them, prospective witnesses, Mr. Simon or the functioning of the Government in this case, other than statements made in open court and made in papers filed in court. . . .
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> "All comments of the Government and defendant to questions by anybody associated with public communications media or people likely to disseminate what is said to them shall be confined to a statement of 'no comment' or 'Whatever we have to say . . . will be said or has been said in court.' "

Transcript of April 10, 1987 Pre-Trial Conference at 6-7.

3 After Mr. Nessen completed his reading of the letter, the following discussion took place:

> THE COURT: Maybe we have no problem. Do you have any trouble with this? I don't have any trouble with the [proposed order]. I don't know why you should.
>
> MS SHANNON: No, your Honor.

cussions, the Government informed the Court and Mr. Nessen that it would be seeking a superseding indictment naming an unspecified number of additional defendants.

Several days later, upon the Government's refusal to execute the stipulation, Mr. Nessen submitted to the Court a proposed order embodying its terms. By letters dated April 16 and April 23, the Government opposed entry of the order. The Government argued that it had never consented to the specific terms of the proposed order and that such terms were inappropriate insofar as they exceeded the scope of Local Criminal Rule 7, to which the Government already considered itself bound.[4]

The Court entered the proposed order on April 23 after considering the extent of both pre-indictment and post-indictment publicity regarding Mr. Simon, the numerous media accounts of an anticipated superseding indictment and the charges likely to be contained therein,[5] the Government's April 10 in-court

> THE COURT: Then we have no problem, right? We'll sign a stipulation and that's it.
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> MR. NESSEN: Great, your Honor.

Transcript of April 10, 1987 Pre-Trial Conference at 8.

4 In its letter of April 16, 1987, addressed to Mr. Nessen, the Government argued that it was in full compliance with Local Criminal Rule 7 and "saw no reason to sign a stipulation which requires the Government to do what it is already bound to do." "Moreover," the Government continued, "the proposed stipulation was presented to us and the Court as a stipulation under Rule 7. In fact, however, it is broader in scope than anything set forth in the Rule. As such, we believe that the proposed stipulation is particularly inappropriate."

In its letter of April 23, 1987, the Government stated that "Mr. Simon [had] mischaracterized the Government's position presented at the pre-trial conference held on April 10, 1987, as well as the scope of Rule 7."

5 *See, e.g.*, the exhibits attached to the following: Affidavit of Maurice N. Nessen in Support of the Proposed Order, 87 Cr. 265 (JMC) (filed S.D.N.Y. April 17, 1987); Affidavit of Maurice N. Nessen In Support of Motion Seeking Criminal Contempt Proceedings ["Motion"], 87 Cr. 265 (JMC) (filed S.D.N.Y. May 28, 1987); Supplemental Affidavit of Maurice N. Nessen In Support of Motion, 87 Cr. 265 (filed S.D.N.Y. June 1, 1987); Second Supplemental Affidavit of David Z. Seide In Support of Motion, 87 Cr. 265 (JMC) (filed S.D.N.Y. June 9, 1987); Reply Affidavit of Maurice N. Nessen, 87 Cr. 265 (JMC) (filed S.D.N.Y. June 22, 1987).

consent to the terms of the proposed order and the lack of any cognizable prejudice to the Government.

On June 3, the grand jury investigating Wedtech returned a superseding indictment containing 58 counts and naming six additional defendants: New York Congressman Mario Biaggi, John Mariotta, Peter Neglia, Bernard Ehrlich, Richard Biaggi and Ronald Betso. On June 5, all defendants named in the superseding indictment were arraigned, with the exception of Bernard Ehrlich. On that date, the Court stated from the bench that the terms of the April 23 Order were being extended to all participants for the duration of the case.[6] During these proceedings, an attorney representing applicant Newsday, Inc. asked to be heard regarding the Order. Newsday was invited by the Court to make a written submission regarding its concerns.

On June 12, a hearing was held concerning the April 23 Order. All parties expressing an interest were provided an opportunity to present their views. First and foremost, the Court polled the individual defendants regarding their positions. Five defendants, Stanley Simon, John Mariotta, Peter Neglia, Bernard Ehrlich and Richard Biaggi expressed support for continuation of the Order; defendants Mario Biaggi and Ronald Betso took no position.[7] Representatives of the applicants, along with a representative of the New York Civil Liberties Union ["NYCLU"] were heard, as was counsel for Mr. Simon. At the conclusion of the hearing, the Court invited further written submissions,[8] granted the request of the represen-

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6 *See* Transcript of June 5, 1987 (arraignment of Stanley Simon) at 3; Transcript of June 5, 1987 (arraignment of Mario Biaggi) at 6.

7 *See* Transcript of June 12, 1987 at 21-22.

8 The Court has received and considered the following submissions from applicants: Letter of June 8, 1987 (Newsday, Inc., The New York Daily News, Dow Jones & Co., Inc., Associated Press, National Broadcasting Co., Inc. and CBS, Inc.); Letter of June 10, 1987 (The New York Times Company); Memorandum of Law In Support of Application to Vacate April 23 Order, 87 Cr. 265 (JMC) (filed S.D.N.Y. June 22, 1987) (on behalf of all applicants); Letter of June 26, 1987 (on behalf of Newsday, Inc.). In addition, the New York Civil Liberties Union submitted a 12 page position letter, dated June 15, 1987.

tatives of the media to have their submissions considered an application to vacate the April 23 Order and reserved decision.

DISCUSSION

I. Standing of Applicants

Applicants are members of the print and broadcast public communications media. At the June 12 hearing, there was some discussion concerning what standing, if any, applicants might possess to challenge an order restraining defendants, their counsel and the United States Attorney ["trial participants"] from making extrajudicial statements when, except for the Government, none had objected to the terms of the Order and no direct restraint had been imposed on applicants or any other newsgathering organization. Applicants have more thoroughly addressed this issue in their written submissions.

Applicants argue that they have standing to challenge the Order because of "[(1)] the free speech right with respect to the persons 'gagged' and [(2)] the free press right of the applicants to gather news for dissemination to the public." Applicants argue that they possess standing "separately to assert *both* rights." Memorandum In Support of Application To Vacate April 23 Order at 5, 87 Cr. 265 (JMC) (filed S.D.N.Y. June 22, 1987) ["Memorandum of Applicants"] (emphasis in original).

A. *The First Amendment and the Individuals Restrained*

Applicants first claim standing to challenge the April 23 Order on account of the "free speech" rights of the individuals restrained by it. As nonparties, which are not subject to the Order, however, applicants do not possess standing to assert the First Amendment rights of the individuals who are subject to the Order. *See Radio & Television News Assn. v. U.S. District Court*, 781 F.2d 1443, 1448 (9th Cir. 1986); *Levine v. U.S. District Court*, 764 F.2d 590, 594 (9th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 2276, 90 L.Ed.2d 719 (1986); *see also Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80, 98 S.Ct. 2620, 2634, 57 L.Ed.2d 595

(1978). This is especially true where, as here, the individuals restrained have not themselves challenged the Order, or otherwise asserted any infringement of their First Amendment rights.[9]

Applicants' challenge is more precisely premised upon an alleged infringement of their First Amendment "right to receive" or "right to listen to" the speech of those individuals restrained by the Order. In support of this first prong of their standing argument, applicants cite the case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 559 n. 2, 100 S.Ct. 2814, 2818 n. 2, 65 L.Ed.2d 973 (1980) (Stewart J., concurring in judgment) (the "right to speak implies a freedom to listen").

In *Virginia State Board*, the Supreme Court struck down a statute declaring it unprofessional conduct for a pharmacist to advertise the prices of prescription drugs. On the issue of standing, the Court found that a consumer group not directly affected by the statute had standing to challenge it on First Amendment grounds because "a right to advertise . . . [creates] a reciprocal right to receive the advertising," which may then be asserted by such potential recipients. *Id.* 425 U.S. at 757, 96 S.Ct. at 1823.[10]

Under *Virginia State Board*, it is clear that when an individual desires to speak but is restrained, the potential recipients of that message have standing to challenge the restraint. *See id.* at 756-57, 96 S.Ct. at 1822-23; *see also Kleindienst v. Mandel*, 408 U.S. 753, 762-63, 92 S.Ct. 2576, 2581, 33 L.Ed.2d 683 (1972)

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9 While it is true that the Government objects to the Order, the Court believes that of the three separate groups subject to the restraints (Government, defendants, defense counsel), the Government is most susceptible to supervision by the Court. *See infra* text at II, D, 3. The Court also notes that subsequent to voicing support for the Order at the June 12 hearing, defendant Mariotta communicated to the Court by letter dated June 15, expressing his "strong[ ] support" for the restrictions imposed by the Court.

10 Of course, in *Virginia State Board*, only the First Amendment was implicated. No balancing between the protections afforded thereunder and the Sixth Amendment's guarantee of a fair trial was necessary.

(citing cases). However, it seen s equally clear that "[f]reedom of speech [and the reciprocal right to receive that speech] *presupposes a willing speaker.*" *Virginia State Board*, 425 U.S. at 756, 96 S.Ct. at 1823 (emphasis added). Of the seven defendants and their counsel in this case, none have objected to or otherwise challenged the April 23 Order in any respect. Indeed, five of the seven defendants openly support the restraints and the remaining two have taken no position. Only the Government has opposed the Order, primarily on the ground that it is not warranted by the circumstances.[11]

In the Court's view, a potential recipient of speech faces a two-step hurdle before he may successfully challenge, on First Amendment grounds, a restraint on the right of others to speak. First, his right to receive speech becomes cognizable only when an individual has indicated a willingness to speak and is being restrained from doing so. *See Virginia State Board*, 425 U.S. at 756, 96 S.Ct. at 1822. Under such circumstances, the potential recipient would have standing to challenge the restraint. Even then, however, the challenge may be defeated if the restraints imposed upon the putative speaker are within the limits permitted by the Constitution. Thus, the potential recipient's rights are entirely derivative of those of the speaker.

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11 In one paragraph letter, dated June 12, 1987, the Government informed the Court that it opposed the Order and "largely concur[red]" with the constitutional analysis proffered by applicants. Also, at the June 12 hearing, the Government suggested that the April 23 Order was "impractical" and had impeded communications between it and potential targets of the Wedtech investigation and their counsel. *See* Transcript of June 12, 1987 at 55-56. The Court finds this representation utterly without merit or foundation. The terms of the Order quite clearly limit the parties from making extrajudicial statements to members of a public communications media or "to any person whom they would reasonably expect to communicate any statement to a public communications media." How those communications mentioned by the Government could in any way be construed to violate the April 23 Order is unclear. In any event, between April 23 and June 3, the date the superseding indictment was returned, the Government made no application to the Court for a modification of the Order for the purpose of carrying on the communications described above. The Government did find it fitting, however, to seek modification of the Order to allow for a press conference announcing the return of a superseding indictment.

Accordingly, applicants stand in a rather precarious position, given the tenuous availability of speech for which protection is sought. As noted, defendants and their counsel have expressed an unwillingness to speak. Indeed, all but two have, in effect, sought the Court's protection from the predictable prodding that often accompanies press efforts in the earnest search for news. Nontheless, because the Order might ultimately restrain some speech, despite defendants' current positions, applicants possess standing as potential recipients to challenge the restraints insofar as they may be unconstitutional with respect to the speakers.

B. *The First Amendment and Freedom of the Press*

Applicants assert a "separate" ground upon which they claim to possess standing to challenge the April 23 Order. This ground is the so-called First Amendment "right to gather and report the news." Upon examination, however, there appears to be little, if any substantive difference between this second prong of applicants' standing argument and the first.

Some courts have characterized the First Amendment's protection for freedom of the press as encompassing a right to gather news. *See, e.g., CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975) ("The protected right to publish the news would be of little value in the absence of sources from which to obtain it."); *National Broadcasting Co., Inc. v. Cooperman*, 116 A.D.2d 287, 289, 501 N.Y.S.2d 405, 406 (2d Dep't 1986) (per curiam) (citing *CBS, Inc. v. Young, supra*); *cf. Branzburg v. Hayes*, 408 U.S. 665, 681, 92 S.Ct. 2646, 2656, 33 L.Ed.2d 626 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.") (dictum); *Richmond Newspapers, Inc.*, 448 U.S. at 583, 100 S.Ct. at 2830 (Stevens, J., concurring in opinion of Burger, C.J.) ("[A]rbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press."); *id.* at 599 n. 2, 100 S.Ct. at 2839 n. 2 (Stewart, J., concurring in judgment) ("The right to publish implies a freedom to gather information.") (citing *Branzburg, supra*).

The Court has no difficulty with the notion that the right to gather and report news is encompassed within the protections afforded under the First Amendment. The issue raised by the instant application, however, involves the constitutional contours of that right and the extent to which First Amendment protection may be used as both shield and sword by members of the media. Applicants' argument is essentially that, by placing restrictions on potential sources of news, the April 23 Order infringes their right to gather and report newsworthy information. *See CBS, Inc.*, 522 F.2d at 237-38; *Cooperman*, 116 A.D.2d at 289, 501 N.Y.S.2d at 406. It is the Court's view, however, that this argument has validity only where the public is entitled to the information to which applicants seek access.

The First Amendment "grants the press no right to information about a trial superior or to that of the general public," *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609, 98 S.Ct. 1306, 1318, 55 L.Ed.2d 570 (1978), nor does it "guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg*, 408 U.S. at 684, 92 S.Ct. at 2658; *see also Zemel v. Rusk*, 381 U.S. 1, 16-17, 85 S.Ct. 1271, 1280-1281, 14 L.Ed.2d 179 (1965); *Radio & Television News Assn.*, 781 F.2d at 1446-47. The media is "granted access [only] to the same information, but nothing more, that is available to the public." *Id.* at 1447; *cf. Pell v. Procunier*, 417 U.S. 817, 834, 94 S.Ct. 2800, 2810, 41 L.Ed.2d 495 (1974) ("[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."). If a district court "determine[s] that the free speech of the trial counsel must be restrained, the media has no greater right than the public to hear that speech." *Radio & Television News Assn.*, 781 F.2d at 1447.

Thus, so long as the restraints imposed upon the trial participants in this case are within constitutional boundaries, applicants possess no separate or "special" right of access to the restrained individuals or speech. *See Branzburg*, 408 U.S. at 684-85 ("Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a

defendant a fair trial before an impartial tribunal."). In *Zemel v. Rusk*, the Court noted that:

> There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right.

381 U.S. at 16-17, 85 S.Ct. at 1281.

Applicants' right to gather and report the news, therefore, is not distinct, in substantive First Amendment terms, from their general right to receive speech discussed above. Where there are no willing speakers, or where constitutionally permissible restrictions on freedom of expression are imposed, the media has no "special" right to obtain such information. *See Branzburg*, 408 U.S. at 684, 92 S.Ct. at 2658; *Warner Communications, Inc.*, 435 U.S. at 609, 98 S.Ct. at 1318; *Levine*, 764 F.2d at 594. Due to the nature of their business, it is perhaps understandable that applicants wish to question and prod the individuals subject to the Order, intending thereby to extract a response. But when the sought after speakers are unwilling to speak, or their speech is restrained consitutionally, the media's right to gather news does not mushroom into an unqualified right to badger and cajole for the purpose of obtaining access to information to which the general public is not otherwise entitled. *See, e.g., Saxbe v. Washington Post Co.*, 417 U.S. 843, 850, 94 S.Ct. 2811, 2815, 41 L.Ed.2d 514 (1974) ("The proposition 'that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally . . . finds no support in the words of the Constitution or in any decision of the Court.' ") (quoting *Pell v. Procunier*, 417 U.S. at 834-35, 94 S.Ct. at 2810); *Zemel*, 381 U.S. at 17, 85 S.Ct. at 1281 ("The right to speak and publish does not carry with it the unrestrained right to gather information."); *see also Central South Carolina, Society of Professional Journalists v. Martin*,

431 F.Supp. 1182, 1187 (D.S.C.), *aff'd as modified*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022, 98 S.Ct. 749, 54 L.Ed.2d 771 (1978).

In constitutional terms, therefore, applicants' right to gather news is no more than a right of access to the same information to which the general public is entitled access, accompanied by a right to distill and disseminate that information to those members of the public willing to pay for such a service. *See Warner Communications, Inc.*, 435 U.S. at 609, 98 S.Ct. at 1318 ("Since the press serves as the information-gathering agent of the public, it [cannot] be prevented from reporting what it [learns in court records open to the public] and what the public [is] entitled to know."); *Richmond Newspapers, Inc.*, 448 U.S. at 586 n. 2, 100 S.Ct. at 2832 n. 2 (Brennan, J., concurring in judgment) (The media's "right of access is at least equal to that of the general public. . . . As a practical matter, however, the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the 'agent' of interested citizens, and funnels information about trials to a large number of individuals."); *Estes v. Texas*, 381 U.S. 582, 541-42, 85 S.Ct. 1628, 1632, 14 L.Ed.2d 543 (1965) ("The public has the right to be informed as to what occurs in its courts, . . . reporters . . . are plainly free to report *whatever occurs in open court*.") (emphasis added); *id.* at 589, 85 S.Ct. at 1663 ("Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public.") (Harlan J., concurring); *see also Radio & Television News Assn.*, 781 F.2d at 1443; *Levine*, 764 F.2d at 594.

Accordingly, the Court holds that applicants have standing to challenge the April 23 Order to the extent that it might, in the future, unconstitutionally restrain willing speakers, or otherwise deprive the general public of information to which it is entitled. In this light, the Court shall address the constitutionality of the restrictions imposed by the Order.

II. The Constitution and Prejudicial Pretrial Publicity

A. *An Overview*

At the outset, the Court recognizes that the task of balancing the rights and interests enshrined in the First and Sixth Amendments is a difficult one:

> The balance that should be struck is between First Amendment rights, the Sixth Amendment rights of the accused, and the public's expectation that the trial will be fair and before an impartial jury. This sort of delicate balancing should be undertaken reluctantly; but when provoked by attorneys, whether prosecutors or defenders, who seek by use of the press to obtain as partial a jury as possible, courts must respond.

Levine, 764 F.2d at 603 (Sneed, J., concurring). The public has a fundamental right to be informed about events which transpire in the course of a criminal trial. *See Richmond Newspapers, Inc.*, 448 U.S. at 575-80, 100 S.Ct. at 2826-29; *Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546 (1947) ("A trial is a public event. What transpires in the court room is public property."). The Court agrees that, "[w]ith respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492, 95 S.Ct. 1029, 1044-45, 43 L.Ed.2d 328 (1975). Of course, nothing in the April 23 Order prevents applicants from covering courtroom events, or reporting on matters of public record, nor does it place any restriction whatsoever on what applicants may publish or broadcast.[12]

At least equal to, if not more fundamental than, the right of the public to be informed, however, is the central theory of our judicial system that "the conclusions to be reached in a [criminal] case [must] be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado*, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907) (Holmes, J.). "Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." *Pennekamp v. Florida*, 328 U.S. 331, 347, 66 S.Ct. 1029, 1037, 90 L.Ed. 1295 (1946); *See Estes*, 381 U.S. at 540, 85 S.Ct. at 1631 (The "atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs.")

12 In this sense, the restraints imposed by the April 23 Order are not as severe as those involved in *Nebraska Press Assn.* (restraints on publication) or *Richmond Newspapers, Inc.* (trial closed to media).

B. *Responsibility of the Court*

It is the responsibility of this Court to guarantee defendants a fair trial by impartial jury.[13] In exercising this responsibility, it

13 Of course, this responsibility is not similarly shouldered by members of the press. Nevertheless,

> The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly—a duty widely acknowledged but not always observed by editors and publishers. It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors.

Nebraska Press Assn. v. Stuart, 427 U.S. 539, 560, 96 S.Ct. 2791, 2803, 49 L.Ed.2d 683 (1976).

At the June 12 hearing, counsel for applicants pointed to the recent acquittal of former Labor Secretary Raymond Donovan in arguing that fair trial rights can be protected despite extensive publicity and that such publicity, without more, does not justify restraints on freedom of expression. *See* Transcript of June 12, 1987 at 33, 40-41. Applicants' argument misses a significant point.

In addition to its constitutional responsibility in protecting the right to a fair trial on the part of individual defendants, the Court must also concern itself with protecting systemic values considered indispensable to the fair administration of justice. For example, following his acquittal, former Labor Secretary Donovan asked rhetorically where he might go to have his reputation restored to him. Mr. Donovan's plaintive plea stemmed at least in part from what he perceived to be a politically-motivated prosecution built upon a non-existent evidentiary foundation. But Mr. Donovan also predicted, correctly it seems, that the publicity surrounding his acquittal was going to be *de*

is the Court's duty to take affirmative steps "to insure the fairness of a criminal proceeding in the face of excessive publicity." *Levine*, 764 F.2d at 596; *see Farr v. Pitchess*, 522 F.2d 464, 468-69 (9th Cir.1975), *cert. denied*, 427 U.S. 912, 96 S.Ct. 3200, 49 L.Ed.2d 1203 (1976); *see also Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d; *Hirschkop v. Snead*, 594 F.2d 356, 366 n. 8 (4th Cir.1979) (en banc) ("The language of the [Supreme] Court [in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966)] is more nearly directive than suggestive.").

In *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), the Supreme Court reversed a state court murder conviction on the ground that the defendant had been deprived of his Sixth Amendment right to a fair trial due to prejudicial pretrial publicity. Although the factual circumstances in *Sheppard* were especially egregious, the fundamental principles established in that case are still with us today and are unquestionably relevant to any analysis regarding the constitutionality of measures taken by a trial court to eliminate prejudicial pretrial publicity. Interestingly enough, in not one of applicants' submissions to the Court is the *Sheppard* case discussed or even mentioned.

In *Sheppard*, the Supreme Court took issue with the failure of the trial judge to more effectively control both pretrial publicity, and the conduct of the press at the trial itself. *See id.* at

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minimis compared with that accompanying his indictment and the early stages of trial. Under circumstances similar to those confronted by Mr. Donovan, lingering notions about an acquitted defendant's character, and even his innocence may remain embedded in the public's collective memory. Apart from the impact these notions may have upon an acquitted defendant's life, employment prospects and stature in the community, such residual effects help to undermine public confidence in the judicial system.

In the aftermath of a celebrated trial, members of the public may come to believe that certain defendants were acquitted not because of their innocence, but rather, because of a prosecutor's incompetence or tactical error, the fame or oratorical skill of defense counsel, or even because of vaguely understood concepts of the "legal technicality" through which an otherwise guilty individual escapes the grasp of justice. These potential implications of extensive publicity are ones which the courts and responsible members of the media must consider in performing their respective duties.

356-63, 86 S.Ct. at 1518-22. The Court wrote that "[e]ffective control of [prejudicial news] sources-concededly within the court's power—might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity." *Id.* at 361, 86 S.Ct. at 1521. The Court went further:

> More specifically, the trial court *might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters*, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable consequences; any belief in guilt or innocence; or like statements concerning the merits of the case.

Id. (emphasis added).

In concluding, the Court declared that "where there is *a reasonable likelihood* that prejudicial news prior to trial will prevent a fair trial," the trial court should take measures to prevent such an occurrence. *Id.* at 363, 86 S.Ct. at 1522 (emphasis added). "[T]he cure lies in those remedial measures that *will prevent the prejudice at its inception*. . . . Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, *but is highly censurable and worthy of disciplinary measures*." *Id.* at 363, 86 S.Ct. at 1522 (emphasis added).

The principles of *Sheppard* were discussed at length by the Judicial Conference's Committee On the Operation of the Jury System, chaired by Judge Irving Kaufman. *See Report on the "Free Press-Fair Trial" Issue*, 45 F.R.D. 391 (1968) ["Kaufman Report"]; *see also Freedom of the Press and Fair Trial: Final Report with Recommendations* (1967) (report by the Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, chaired by Judge Harold R. Medina). The Kaufman Report recommended that "[i]n a widely publicized or sensational case, the Court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to inter-

fere with the rights of the accused to a fair trial by an impartial jury." 45 F.R.D. at 409. The Report concluded that a special order might include "[a] proscription of extrajudicial statements by participants in the trial, including lawyers, parties, witnesses, jurors, and court officials, which might divulge prejudicial matter not of public record in the case." *Id.* at 409-10 (citing *Sheppard*, 384 U.S. at 361, 86 S.Ct. at 1521).

Of course, the recommendations found in the Kaufman Report, which specifically relied upon and quoted the *Sheppard* case as authority, were eventually embodied in this District's Local Criminal Rule 7. Local Rule 7(a) specifically forbids lawyers in a criminal case from making extrajudical statements concerning "the identity, testimony or credibility of prospective witnesses" or "[a]ny opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case." These very categories of extrajudicial statements were among those described in *Sheppard* as "divulg[ing] prejudicial matters." 384 U.S. at 361, 86 S.Ct. at 1521. These are the very statements which, in the proper case, a trial court may "proscribe[ ] any lawyer, party, witness, or court official from making." *Id.*

Sheppard has never been abandoned nor its principles diluted by the Supreme Court in subsequent cases. On the contrary, its recommendations for preventive measures regarding prejudicial publicity have been cited and discussed approvingly in some of the cased cited by applicants. *See Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 563-64, 96 S.Ct. 2791, 2804-05, 49 L.Ed.2d 683 (1976); *Branzburg*, 408 U.S. at 685, 92 S.Ct. at 2658; *see also In re Russell*, 726 F.2d 1007, 1009-11 (4th Cir.), *cert. denied*, 469 U.S. 837, 105 S.Ct. 134, 83 L.Ed.2d 74 (1984); *In re Application of National Broadcasting Company, Inc.*, 635 F.2d 945, 951 (2d Cir.1980); *United States v. Tijerina*, 412 F.2d 661, 666-67 (10th Cir.), *cert. denied*, 396 U.S. 990, 90 S.Ct. 478, 24 L.Ed.2d 452 (1969).

Under *Sheppard* and its progeny, this Court is required to take those steps reasonably calculated to prevent the dissemination of prejudicial publicity. One such step is to proscribe prejudical extrajudicial statements by lawyers and other participants in the case. As the Court has previously acknowledged, the

April 23 Order as it now stands is overbroad, *see* Transcript of June 12, 1987 at 39, in that it prohibits *all* comments concerning the case. Such a sweeping prohibition includes factual statements and descriptions of pending motions or other matters of public record for which there can be no reasonable likelihood of prejudicial impact. Accordingly, in modifying the Order, the Court considers those restraints which are permitted under the First Amendment.

C. *Permissible Restraints on Pretrial Publicity*

In *Nebraska Press Assn.*, the Supreme Court held that before placing a prior restraint on *publication*, a trial court must examine "(a) the nature and extent of pretrial news publicity; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger." 427 U.S. at 562, 92 S.Ct. at 2804.

1. *The Nature and Extent of Pretrial Publicity*

Applicants argue that before any prior restraints may be placed on freedom of expression, specific findings must be made that the expression "restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest." Memorandum of Applicants at 8. A few courts have taken this or like position in striking down prior restraints of speech in criminal cases. *See, e.g., CBS, Inc.*, 522 F.2d at 289; *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir.1975); *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir.1970) (per curiam).

However, in upholding prior restraints, other courts have utilized a lesser and in the Court's view, more realistic standard, that of a reasonable likelihood that the activity restrained might result in an unfair trial. *See, e.g., Central South Carolina Chapter*, 431 F.Supp. at 1188 (approving "reasonable likelihood" standard, although finding, on the facts of the case, a "substantial likelihood" of prejudice to fair trial rights), *aff'd as modified on other grounds*, 556 F.2d 706 (4th Cir.1977), *cert. denied*, 434 U.S. 1022, 98 S.Ct. 749, 54 L.Ed.2d 771 (1978);

Tijerina, 412 F.2d at 666, *Cooperman*, 116 A.D.2d at 292, 501 N.Y.S.2d at 408 (" 'reasonable likelihood' of a serious threat to a defendant's right to a fair trial"); *see also Report of the Ad Hoc Hoc Committee on Pretrial Publicity* at 5 (Association of the Bar of the City of New York, April 1987) ("reasonable likelihood of a serious threat to a particular defendant's right to a fair trial") ["Ad Hoc Committee Report"].

The starting point for analysis in this area must be governing Supreme Court precedent. The Supreme Court has never held that proscriptions on extrajudicial statements which might be prejudicial require specific findings of a "serious and imminent threat" to a fair trial. *Sheppard* speaks only of a "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial." 384 U.S. at 363, 86 S.Ct. at 1522; *see Tijerina*, 412 F.2d at 666. In addition, conclusions "as to the impact of [prejudicial) publicity on prospective jurors [are] of necessity speculative, dealing [as they do] with factors unknown and unknowable." *Nebraska Press Assn.*, 427 U.S. at 563, 96 S.Ct. at 2804.

When a trial court finds extensive and pervasive pretrial publicity, it may "reasonably conclude, based on common human experience, that [such] publicity *might* impair the defendant's right to a fair trial." *Id.* Nothing more is required. It is specious to suggest that, in light of the standards announced in *Sheppard* and *Nebraska Press Assn.*, the Court must make "specific factual findings" as to how defendants are being or will be prejudiced. Prejudice to the defendants due to extensive *pretrial* publicity will occur at the time *of trial*, not before. "[G]iven the pervasiveness of modern communications and the difficulty of *effacing prejudicial publicity from the minds of . . . jurors*," *Sheppard*, 384 U.S. at 362, 86 S.Ct. at 1522 (emphasis added), it will then be too late for this Court to ensure defendants a trial free of prejudicial taint. Accordingly, the Court "must take strong measures to ensure that the balance [between the First Amendment's protections of freedom of expression and the Sixth Amendment's guarantee of a fair trial] *is never weighed against the accused*." *Id.* (emphasis added).

This case is at the vortex of a large-scale Government investigation into the affairs of the Wedtech Corporation. The nation-

wide investigation being conducted focuses on Wedtech's involvement with various Government agencies and public officials. An independent counsel has been appointed and the Attorney General of the United States is himself under investigation. In evaluating the publicity surrounding and impacting upon this case, the Court cannot ignore the larger sea from which it was spawned.

Furthermore, the history of this case points up what the Court can only describe as a shameful abuse of grand jury secrecy. Extensive publicity and media speculation predated the indictment of Stanley Simon in early April. Following Mr. Simon's indictment and continuing up to the return of the superseding indictment on June 3, there was massive publicity concerning the targets of the ongoing grand jury investigation, the allegations being presented before the grand jury, and in some instances the identities and testimony of witnesses before the grand jury.[14] All of these apparent "leaks" occurred despite the April 23 Order.

Given the sensational nature of this case, the egregious pattern of grand jury leaks, the involvement of two prominent, elected public officials, the near certainty that any statements made by the trial participants would be widely publicized, the extensive media coverage of the continuing investigation into the affairs of Wedtech and the inherent difficulty of effacing prejudicial associations from the minds of prospective jurors,[15]

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14 For example, one article quotes a "well-placed source" as saying New York Senator Alfonse D'Amato had been "a valuable asset for the prosecution" in the investigation of Congressman Biaggi. The article went on to say that the same source expected Senator D'Amato to be a witness at the trial. *See* Weiss, "D'Amato Helped Wedtech Probe Team Nail Biaggi," New York Post, June 6, 1987.

15 The Court finds highly persuasive the reasoning of the Federal District Court in *Central South Carolina Chapter, Society of Professional Journalists v. Martin*, 43. F.Supp. 1182 (D.S.C.), *aff'd as modified*, 556 F.2d 706 (4th Cir.1977), *cert. denied*, 434 U.S. 1022, 98 S.Ct. 749, 54 L.Ed.2d 771 (1978), and hereby adopts such reasoning as its own. In denying the request of news-gathering organizations to vacate its order placing restrictions on prejudicial extrajudicial statements, the court wrote:

the Court finds that an unrestrained field of attorneys and defendants would add enough fuel to an already voracious fire of publicity to create, at the very least, a real and substantial likelihood that some, if not all, defendants might be deprived of a fair trial.[16]

> Prior to entering the [restraining order], from the Court's reading of various newspapers within the State . . . and watching and listening to reports on the broadcast media, this Court took notice of the widely publicized and sensational nature of the criminal case against [the defendant], a state senator, and his co-defendants. The publicity was and remains extensive as can readily be evidenced by the collected newspaper clippings presented by the plaintiffs in this action . . . and this collection represents only a portion of the total continuing publicity. The Court has also taken notice of the numerous and extraordinary inquiries made by representatives of the press and news media to this Court concerning this particular criminal case. The Court has also taken notice, that the information contained in the media reports contrary to the assertions of the plaintiffs, is unrestrained and often of a prejudicial nature and would be inadmissible evidence at a trial. All such information, particularly prejudicial information, that is widely disseminated has the effect of making more difficult the selection of an impartial jury. *Selection becomes particularly more difficult when statements of trial participants in particular are widely published. Thus in widely published or sensational cases, where the statements of trial participants are likely to appear in a widely disseminated manner, there is a substantial likelihood that prospective jurors are unwittingly exposed to statements constituting prejudicial inadmissible evidence that would jeopardize the defendants' rights to a fair trial.* To the extent that the Court has authority, it is the duty of the Court to prevent that kind of jury prejudice.

431 F.Supp. at 1189, *aff'd as modified on other grounds*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022, 98 S.Ct. 749, 54 L.Ed.2d 771 (1978) (emphasis added).

16 Even as this Memorandum and Order is being prepared for filing, its rationale is fortified by an event which occurred on July 8, 1987. It involves a statement by Congressman Biaggi's attorney, made in response to a reporter's question, which the Government now seeks to introduce against Mr. Biaggi at a trial to be held before Judge Weinstein in the Eastern District of New York. This clearly demonstrates the great harm that can befall parties to a litigation from remarks made randomly, off-the-cuff or based on speculation, rather than after reflection and proper preparation.

2. *Less Restrictive Alternatives*

The second factor the Court must consider is whether less restrictive alternatives would ensure the defendants a fair trial. *See Nebraska Press Assn.* 427 U.S. at 563-64, 96 S.Ct. at 2804-05. Such measures might include a change of venue, postponement, searching voir dire, sequestration and emphatic instructions to the jurors. With the exception of a change of venue and sequestration, all of these measures will need to be taken regardless of the April 23 Order.

(i) *Postponement*

The trial date has already been postponed in order to give defense counsel more time to adequately prepare. While in some cases, a postponement might serve to quell public interest in and press coverage of a particular matter, such a waning of coverage is unlikely in the instant case. The Government's investigation into Wedtech is continuing and press accounts concerning it appear almost daily. A number of other indictments stemming from this investigation are expected and will, of course, engender substantial additional publicity. Given these circumstances, it is unlikely that an additional postponement will effectively reduce the publicity surrounding this particular case, or that publicity concerning the Wedtech investigation generally will abate anytime in the near future.

(ii) *Voir Dire, Jury Instructions and Sequestration*

Regardless of what occurs in the months between now and the onset of trial, prospective jurors will have to be questioned extensively about their exposure to the publicity surrounding this case. There exists the view that "years of *voir dire* experience [has] disclosed that a very substantial number of prospective jurors do not read the papers or listen to the nightly news and that if they do, they do not remember anything of importance by the time trial arrives." Ad Hoc Committee Report at 5 (paraphrasing the view expressed by United States Attorney Rudolph Giuliani and Harvard Law Professor Alan Dershowitz

at a forum sponsored by the Association of the Bar of the City of New York on October 28, 1985).

The argument that most jurors ultimately selected in highly publicized cases have little recollection of pretrial news reports concerning the case does not persuade the Court that judicial vigilance over the dissemination of prejudicial extrajudicial statements should be relaxed. In the Court's view, absence from the jury of individuals who read daily newspapers and keep abreast of newsworthy developments is simply not the best of all possible worlds, especially in a lengthy and complex criminal case where decisions regarding guilt or innocence will often require painstaking attention to evidentiary detail. *See generally Levine*, 764 F.2d at 600 ("It is not in the parties' interest or in the interest of justice to exclude from the jury all citizens who read the Los Angeles Times or who otherwise keep abreast of current events.").

Moreover, in a case of this kind, jurors will need to be given emphatic instructions to disregard any publicity to which they had been exposed, regardless of the extent of such exposure. Jury instructions alone, however, are not always an adequate remedy where a trial has been infected with extensive pretrial publicity. *See id.* at 600; *Silverthorne v. United States*, 400 F.2d 627, 643 (9th Cir.1968); *Issacson, Fair Trial and Free Press: An Opportunity for Coexistence*, 29 Stan.L.Rev. 561, 566-67 (1977).

Sequestration of jurors is a drastic remedy, which cannot be recommended lightly. As the court in *Levine* noted, "sequestration is an undesirable alternative. Jurors, especially in long trials, should not bear the brunt of counsels' transgressions. Moreover, the resentments and . . . harassment which derives from sequestration can often impede calm and rationale deliberation." 764 F.2d at 600 (adopting district court's rationale for rejecting sequestration alternative).

Moreover, the Court notes that these alternative measures are of the "palliative" variety discussed in *Sheppard*. The "cure," wrote the Court, is in preventing dissemination of prejudicial matter in the first instance. 384 U.S. at 363, 86 S.Ct. at 1522. Reasonable restraints, imposed at this stage and narrowly tailored to the censure of prejudicial statements, to which potential listeners have no right of access, are certainly far more desirable from both a judicial and societal standpoint than direct restraints on the publication of prejudicial extrajudicial statements. *See Nebraska Press Assn*, 427 U.S. at 601, 96 S.Ct. at 2823 (Brennan, J., with Stewart and Marshall, JJ., concurring in judgment) (Trial court should "stem much of the flow of prejudicial publicity *at its source, before it is obtained by representatives of the press.*") (emphasis added); *Sheppard*, 384 U.S. at 363, 86 S.Ct. at 1522 ("[R]emedial measures [must be taken] that will prevent the prejudice at its inception."); *see also Levine*, 764 F.2d at 600-01; *Application of National Broadcasting Co., Inc.*, 635 F.2d 945, 951 (2d Cir.1980); *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir.1975) ("The most practical and recommended procedure to insure against dissemination of prejudical information is the entry of an order directing that attorneys, . . . and witnesses refrain from releasing any information which might interfere with the right of the defendant to a fair trial."), *cert. denied*, 427 U.S. 912, 96 S.Ct. 3200, 49 L.Ed.2d 1203 (1976).

3. *Effectiveness of the Restraint*

The last of the *Nebraska Press Assn.* factors involves an examination of whether the restrictions will be effective in achieving the desired results. The April 23 Order has already had a salutary effect in this case. It has negated any characterization of the defendants or the offenses with which they are charged.[17] Defense counsel have been able to focus their atten-

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17 An egregious example of this type of conduct occurred at the June 3 press conference announcing the return of the superseding indictment. United States Attorney Rudolph Giuliani announced that this Court's Order of June 1 allowed the press conference to go forward with "the principal restriction being that no one should be characterizing these charges except to state what's in the indictment and what's on the public record." Following this statement, Bronx District Attorney Mario Merola made the following remarks:

> Ladies and Gentlemen. I am happy to be here and to be . . . part of something which I perceive to be probably the largest corruption, criminal investigation, probably in the history of the nation. It crosses city lines, it crosses state lines, it crosses federal lines. Also it has its tenta-

tions on trial preparation, rather than engaging in combative discourse with members of the press. Likewise, defendants have been able to prepare for trial and otherwise carry on with their lives in a less frenzied atmosphere.

D. *The Individuals Restrained*

1. *Defendants*

Defendants have not objected to the April 23 Order. Indeed, five defendants openly support the Order and two take no position. In the Court's view, this fact lessens the burden which must be met in justifying restraints on defendants, although, as discussed above, the Court believes that under *Sheppard* and its progeny, it is empowered to impose such restraints.

The Court also deems it significant that this is a multi-defendant criminal case. Without restraints imposed uniformly on all defendants, one might choose to make a statement or respond to persistent questioning from members of the press. If such statements were of a prejudicial nature, the rights of other defendants (or even the rights of the individual defendant himself) might be seriously compromised.

In addressing this issue in its submission to the Court, the NYCLU writes: "[R]ather than the imposition of a restraining order upon *unwilling* defendants, a more desirable approach would be to require that defendants reach some sort of accord with respect to what they will say to the press or whether they will say anything. Defendants can, of course, decline to talk to the press. And upon this logic, . . . they could also enter into a stipulation in which they agree not to talk to the press." Letter of NYCLU at 9 n. 12 (S.D.N.Y. June 15, 1987) (emphasis added). Apart from the obvious misstatement in this letter to the effect that defendants are "unwilling" to have restraints

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cles in Puerto Rico and probably in Hawaii. . . . I suspect that the bottom line is that corruption or greed has no bias.

Exhibit 1, Reply Affidavit of Maurice N. Nessen, 87 Cr. 265 (JMC) (filed S.D.N.Y. June 22, 1987) (Transcript of June 3, 1987 Press Conference Announcing Superseding Indictment).

placed on their freedom of expression, the Court does not believe there is any substantive difference between the suggestion offered by the NYCLU and the circumstances in which the defendants currently find themselves. Accordingly, so long as no individual defendant challenges the restraints, the Court shall subject all defendants to them.

2. *Defense Counsel*

The discussion found in the main body of this Memorandum and Order apply to those restraints upon defense counsel countenanced by the First Amendment and shall not be repeated here.[18] Moreover, the Court notes that, like the individual defendants, no defense counsel has objected to or otherwise challenged the Order.

3. *The United States Attorney*

It is a duty of the prosecution "to seek justice and not merely to convict, to refrain from discussing pending criminal cases except as to matters of record." Ad Hoc Committee Report at 11.[19] In this regard, the Supreme Court has stated:

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18 *See* §§ II, A-C *supra*. Of course, "[a]s officers of the court, . . . attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Nebraska Press Assn.*, 427 U.S. at 601 n. 27, 96 S.Ct. at 2823 n. 27 (Brennan, J., concurring in judgment). "It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases." *Id.*; *see In re Sawyer*, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959).

19 The Department of Justice has detailed guidelines concerning the release of information related to pending criminal proceedings. The guidelines admonish that:

> At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement or information, which could reasonably be expected to be disseminated by means of public communication, if such statement or information may reasonably be expected to influence the outcome of the pending or future trial.

28 C.F.R. § 50.2(b)(2) (1984).

Disclosures should be limited to areas such as the age, employment and marital status of defendants, *see, e.g., id.* § 50(b)(3)(i) or "[t]he substance or

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty

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text of the charge, such as a complaint, indictment, or information." *Id.* § 50(b)(3)(ii). Moreover, Government prosecutors are further admonished that

> Disclosures should include *only incontrovertible, factual matters, and should not include subjective observations.* In addition, where background information relating to the circumstances of an arrest or investigation would be highly prejudicial or *where the release thereof would serve no law enforcement function, such information should not be made public.*

Id. § 50.2(b)(3)(iv) (emphasis added).

Perhaps most telling, especially in light of the position taken by the Government in this case, is the Department's determination that

> Because of the *particular danger of prejudice* resulting from statements in the period approaching and during trial, they *ought strenuously to be avoided* during that period. Any such statement or release shall be made only on the infrequent occasion when circumstances *absolutely demand disclosure of information and shall include only information which is clearly not prejudicial.*

Id. § 50.2(b)(5) (emphasis added).

The Government's position in this case is even more surprising given the Department of Justice's conclusion that "[t]he release of certain types of information *generally tends to create dangers of prejudice without serving a significant law enforcement function.*" *Id.* § 50.2(b)(6) (emphasis added). Not surprising, these categories of information, the release of which "personnel of the Department should refrain from making," *id.*, are essentially derived from *Sheppard* and include "[o]bservations about a defendant's character," *id.* § (6)(i), "[s]tatements concerning the identity, testimony, or credibility of prospective witnesses," *id.* § (6)(iv), "[s]tatements concerning *evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial,*" *id.* § (6)(v), or "[a]ny opinion as to the accused's guilt," *id.* § (6)(vi).

In D. Gillmore, *Free Press and Fair Trial* 39-40 (1966), the author discusses a memorandum written by then-United States Attorney for the Connecticut District, Jon O. Newman in December 1964. According to Gillmore, the memorandum "prohibit[ed] [federal prosecutors] from making disclosures to the press involving prospective evidence, statements of witnesses, reports of investigative agencies, and opinions as to the guilt of the accused persons." *Id.* at 39. Gillmore's work quotes the memorandum as stating: "Close questions as to what may appropriately be disclosed are to be resolved against disclosure and in favor of protecting the accused's right to a fair trial. . . . To put it simply, if in doubt, keep silent." *Id.* at 39-40.

> whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

Prosecutors "may be subjected in gag orders to more stringent restraints than are defense counsel." *Levine*, 764 F.2d at 602 (Sneed, J., concurring); NYCLU Letter at 8-11; Federal Bar Council Committee on Second Circuit Courts, *Reports on the Permissible Scope of Extrajudicial Statements of Attorneys in Federal Criminal Cases* 11 (April 1987); Arkin, *Self Defense By the Defense—Publicity, Fair Trial*, N.Y.L.J., June 11, 1987, at 2. The Government simply has no legitimate basis to demand a free hand in speaking to the press about this case if its extrajudicial statements go beyond matters contained in the indictment or already part of the public record. *See United States v. Alberico*, 604 F.2d 1315, 1320 n. 15 (10th Cir.) ("The prosecution is not free to release or say whatever it wishes about pending cases."), *cert. denied*, 444 U.S. 992, 100 S.Ct. 524, 62 L.Ed.2d 422 (1979). As Justice Frankfurter once wrote:

> To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial is to make the State itself, through the prosecutor who wields the power, a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice.

Stroble v. California, 343 U.S. 181, 201, 72 S.Ct. 599, 609, 96 L.Ed. 872 (1952) (Frankfurter, J., dissenting).

E. *Summary*

As modified, the Court's Order will prohibit those statements and comments which the Supreme Court, in *Sheppard*, found

to be prejudicial per se. As such, at least in highly publicized cases, the proscription of statements concerning the merits of the case, the character of the defendants, the identity or credibility of potential witnesses, or the quality or content of evidence, *see* 384 U.S. at 361, 86 S.Ct. at 1521, is both a duty of the trial court and constitutional per se. Such statements have no place in an adjudicative process which permits "no one [to] be punished for a crime without 'a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, [or] excitement.' " *Id.* at 350, 86 S.Ct. at 1516 (quoting *Chambers v. Florida*, 309 U.S. 227, 236-37, 60 S.Ct. 472, 476-77, 84 L.Ed. 716 (1940)).

CONCLUSION

For all the foregoing reasons, it is hereby

ORDERED, that the United States Attorney and the District Attorney for Bronx County, their representatives and agents, defendants Stanley Simon, Mario Biaggi, John Mariotta, Peter Neglia, Bernard Ehrlich, Richard Biaggi and Ronald Betso, and their counsel and representatives SHALL NOT MAKE ANY extrajudicial statement concerning this case (1) to any person associated with a public communications media, or (2) that a reasonable person would expect to be communicated to a public communications media, except that nothing in this Order shall prohibit any individual from:

(A) Stating, without elaboration or characterization—

(1) the general nature of an allegation or defense;

(2) information contained in the public record;

(3) the scheduling or result of any step in the proceedings; or

(B) Explaining, without characterization, the contents or substance of any motion or step in the proceedings, to the extent such motion or step is a matter of public record.[20]

This Order supersedes all previous orders.[21]

SO ORDERED.

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20 *See* Ad Hoc Committee Report at 8-9. In this part of its Report, the Committee proposed an amendment to the New York Code of Professional Responsibility's disciplinary rule regarding trial publicity (DR7-107(A)-(B). The proposed amendment explicitly exempted certain categories of speech from the general proscriptions. These categories have, in large measure, formed the basis for the exceptions listed in the Court's modified Order.

21 The Court's purpose in holding the June 12 hearing was threefold. First, applicants were allowed an opportunity to supplement their written submissions. Second, the Court sought to ascertain the positions of the defendants, their counsel and the Government regarding the scope of the April 23 Order. Third, the Court sought to elicit suggestions for alternatives to the Order's restrictions, which might satisfy the legitimate concerns of applicants, trial participants and the Court.

In the end, applicants could suggest nothing short of vacatur. Mr. Nessen, counsel for Stanley Simon, was similarly bereft of suggestions for alternative restrictions and urged that the Court retain the Order as it stood. Both sides argued that nothing short of their stated positions could adequately protect their respective rights. Thus, the Court was presented with the Hobson's choice of continuing a blanket restriction upon all statements concerning this case or abdicating its role as guarantor of defendants' Sixth Amendment rights by allowing unrestrained commentary, assuming of course, willing speakers in the future. The Court has, instead, chosen a middle road.

Read in conjunction with this Memorandum, the Order provides clear guidance as to those categories of speech that are proscribed. Essentially, these categories are those discussed in *Sheppard* and subsequently embodied in Local Criminal Rule 7. *See* §§ II, B; II, E *supra*. In the Court's view, the entire range of legitimate speech concerning "this case" falls within the four categories of exceptions. Thus, as modified, the Order is neither overbroad in scope, nor unconstitutionally vague. *See, e.g.*, *Smith v. Goguen*, 415 U.S. 566, 572-73, 94 S.Ct. 1242, 1246-47, 39 L.Ed.2d 605 (1974).

APPENDIX

Endorsement and Order

The Court having considered the annexed proposed order offered by defendant, as well as the Government's letter in response, dated April 23, 1987, and it appearing to the Court that this matter is "a widely publicized or sensational case" within the meaning of Local Criminal Rule 7(c), and it further appearing, from the annexed news clippings and others that have become known to the Court, that the general proscriptions of Rule 7 are not sufficient under these circumstances, and the Government having previously consented to the essential terms of the annexed proposed order at a pretrial conference held before the Court on April 10, 1987, and the Government having presented no legal or factual reason why entry of such an order will be prejudicial to its interests, it is

ORDERED, that pending a ruling on defendant's forthcoming motion addressed to pretrial publicity, the parties shall abide the terms of the annexed proposed order.

It is So Ordered.

/s/ JOHN M. CANNELLA
John M. Cannella
United States District Judge

Dated:
New York, New York
April 23, 1987

IT IS HEREBY ORDERED:

1. The United States of America and any organization or people associated with it (collectively "the government") and the defendant and all his representatives (collectively "defendant") shall not, until the Court rules on a motion to be addressed to pre-trial publicity under Rule 7(c) of the Criminal Rules of the Southern and Eastern Districts, make any extrajudicial statement to any person associated with a public communications media or to any person whom they would

reasonably expect to communicate any statement to a public communications media in regard to: (i) this case, (ii) the indictment or any proposed or actual superseding indictment or any facts relating to them, (iii) prospective witnesses, (iv) Mr. Simon or (v) the functioning of the government in this case other than statements made in open court or made in papers filed in court.

2. All comments of the government and defendant to questioning by anybody associated with public communications media or people likely to disseminate what is said to them shall be confined to a statement of "no comment" or "whatever we have to say will be said or has been said in court."

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

87 Cr. 265 (CBM)

In re Application of

DOW JONES & COMPANY, INC., THE NEW YORK TIMES COMPANY, CBS, INC., NATIONAL BROADCASTING COMPANY, INC., NEW YORK NEWS, INC., THE ASSOCIATED PRESS, and NEWSDAY, INC.,

Applicants,

UNITED STATES OF AMERICA,

—v.—

STANLEY SIMON, et al.,

Defendants

ORDER

In accordance with the memorandum opinion filed simultaneously herewith, the applicants' motion to reargue this court's July 10 order is denied.

SO ORDERED

Dated: New York, New York
July 27, 1987

/s/ CONSTANCE BAKER MOTLEY
Constance Baker Motley
U.S.D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

87 Cr. 265 (CBM)

In re Application of

DOW JONES & COMPANY, INC., THE NEW YORK TIMES COMPANY, CBS, INC., NATIONAL BROADCASTING COMPANY, INC., NEW YORK NEWS, INC., THE ASSOCIATED PRESS, and NEWSDAY, INC.,

Applicants,

UNITED STATES OF AMERICA,

—v.—

STANLEY SIMON, et al.,

Defendants

MEMORANDUM OPINION

Dow Jones & Co., Inc., the New York Times Co., CBS, Inc., National Broadcasting Company, Inc., New York News, Inc., the Associated Press, and Newsday, Inc. [the "applicants"] have moved for reargument of this court's order of July 10 placing certain restrictions on counsel and parties regarding what they may say to the media about the above-captioned case. For the reasons stated below, the motion is denied.

This case was originally assigned to Judge Cannella of this court. On April 23, 1987, Judge Cannella entered an order restricting statements to the media by parties and counsel pending a final determination of a motion dealing with pretrial publicity. Judge Cannella then considered lengthy submissions regarding this motion and heard oral argument from the parties

and the applicants. On July 10, 1987, he modified his order but left certain restrictions in place, explaining his reasons in a 42-page opinion.

This case was then reassigned to my docket, and the applicants moved to reargue Judge Cannella's decision before me. The applicants have called no facts or binding legal authorities to my attention that were not before Judge Cannella when he rendered his decision, nor do I find "clear error" in Judge Cannella's opinion. Therefore, I decline to review Judge Cannella's ruling. *See Hayman v. Cash Register Co. v. Sarokin*, 669 F.2d 162, 165 (3rd Cir. 1982); *O'Hagan v. Soto*, 565 F.Supp. 422, 425-27 (S.D.N.Y. 1983), *rev'd on other grounds*, 725 F.2d 878 (2d Cir. 1984).

The applicants' motion to reargue this court's July 10 order is denied.

Dated: New York, New York
July 27, 1987

/s/ CONSTANCE BAKER MOTLEY
Constance Baker Motley
U.S.D.J.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 87-7644

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 6th day of May, one thousand nine hundred and eighty-eight.

In re Application of

DOW JONES & COMPANY, INC., THE NEW YORK TIMES COMPANY, CBS INC., NATIONAL BROADCASTING COMPANY, INC., NEW YORK NEWS INC., THE ASSOCIATED PRESS, and NEWSDAY, INC.,

Applicants,

DOW JONES & COMPANY, INC., THE NEW YORK TIMES COMPANY, CBS INC., NATIONAL BROADCASTING COMPANY, INC., THE ASSOCIATED PRESS, and NEWSDAY, INC.,

Applicants-Appellants,

UNITED STATES OF AMERICA,

—v.—

STANLEY SIMON, MARIO BIAGGI, PETER NEGLIA, JOHN MARIOTTA, BERNARD EHRLICH, RICHARD BIAGGI and RONALD BETSO,

Defendants,

STANLEY SIMON, PETER NEGLIA, JOHN MARIOTTA, BERNARD EHRLICH, and RICHARD BIAGGI,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants DOW JONES & COMPANY, INC., et al

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk

Transcript of the June 5, 1987
10 O'Clock News on WYNY TV (Channel 5)

Announcer: . . . defendants were arraigned in the Wedtech scandal. Pablo Guzman reports.

Pablo Guzman: Congressman Mario Biaggi was the most prominent of defendants who were arraigned today. The media crush which swarmed over Foley Square was there for him. By contrast, the other defendants like former Bronx Borough President, Stanley Simon, arrived to relatively little fan fare.

Maurice N. Nessen: There's an order outstanding, and until it's modified we can't say anything.

Guzman: Inside Judge John Cannella's courtroom the defendants, who pleaded not guilty, were all released on personal bonds and their travel was restricted. Besides Simon and Biaggi, the other Wedtech defendants included Biaggi's son, standing to the right of his father, Peter Neglia, former New York head of the Small Business Administration and John Mariotta, the former Wedtech chairman and evangelical who some reports link to the alleged hush monies paid to PTL in the Jessica Hahn affair. A seventh defendant, former Biaggi law partner Bernard Ehrlich, shown in the middle, was absent today. Two days ago, Congressman Biaggi indicated he would answer reporter's questions today.

Biaggi: And I regret my inability to respond to questions. Because I want to. I want to. To your questions. And I will, the next time we meet.

Guzman: But after today's arraignment, Biaggi was silent and all his attorney would say was:

Barry Slotnick: Whatever we have to say will be said or has been said in court.

Reporter: The congressman promised us a statement two days ago.

Slotnick: The judge has ordered a gag order . . . .

Guzman: Investigators say the probe into Wedtech is continuing, with more indictments coming down possibly in the next two weeks, allegedly including an indictment against Congressman Robert Garcia. Investigators also say that this is not the end of the probe into political corruption. There are the cable contract cases, the awarding of towing contracts and how the Bronx Democrats did their business.

From outside the federal court in lower Manhattan, I'm Pablo Guzman, Chanel 5 News.

(2)

Supreme Court, U.S.
FILED
OCT 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-229

In The

Supreme Court of the United States

October Term, 1988

DOW JONES & COMPANY, INC., CBS INC., NATIONAL BROADCASTING COMPANY, INC., THE ASSOCIATED PRESS, and NEWSDAY, INC.,

Petitioners,

v.

STANLEY SIMON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COUNTERSTATEMENT OF THE CASE

Respondent Stanley Simon opposes the petition for a writ of certiorari for review of the judgment of the United States Court of Appeals of the Second Circuit in this case. The Court should not tarry to decide the fate of the so-called "gag order": not only because the First Amendment claims are without merit and the opinion of the Court of Appeals is in accord with decisions of this Court and other Circuit Courts, but also because petitioners (corporations in the business of publishing and broadcasting the news) slept on their rights and did not come to the Court while the trial of the case was before the jury and the appeal had some meaning to Mr. Simon.

The petitioning news companies appealed to the Court of Appeals from an order entered on July 10, 1987, by District Judge John M. Cannella in the Southern District of New York, 664 F. Supp. 780 (S.D.N.Y. 1987) ("the July 10 order") and a subsequent order of District Judge Constance Baker Motley denying reargument (unreported).[1] The July 10 order of the District Court at issue, captioned *United States v. Stanley Simon, et al.*, No. SSSS 87 Cr. 265 (CBM) (S.D.N.Y. 1987), limited what the parties in that case and their lawyers and agents could say to people associated with the news media or those close to them. The government took no appeal from the July 10 order.

At the time that the Second Circuit affirmed the July 10 order, reported at 842 F.2d 603 (2d Cir. 1988), on March

---

[1] All of the opinions for the case have been reproduced in the Appendix of the petitioners' brief.

14, 1988, the criminal trial was just underway. It went on for five months – until August 4, 1988, when the jury reached its verdict and six of the defendants, including Stanley Simon, were convicted. The news companies did not file their certiorari brief until the very last day that they could – coincidently the date of the jury verdict.[2] On that same day, the Government asked the District Court to lift the restraining order in open court. The defendants did not oppose. The order was lifted instantly.

Accordingly, there is no longer a controversy involving defendants over the July 10 order. For Stanley Simon, the issues here are moot. And every dollar he has must be channeled to his appeal.

We submitted a letter on August 30, 1988, stating our opposition to certiorari on the grounds of practical mootness and on the equities. The Court has, however, asked for a response. As a courtesy to the Court, we do so. To save expenses, we have printed extracts from our Court of Appeals brief on the merits of the July 10 order and ask the Court's indulgence.

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[2] The petition for Rehearing and Suggestion for Rehearing *en banc* was denied on May 6, 1988 – three months before the petitioners filed a brief for a writ of certiorari.

ARGUMENT

1.

Certiorari should be denied as a matter of fairness: petitioners slept on their rights and it would be unfair to burden Mr. Simon or his counsel with the expense of an appeal to this Court.

The equities, which are relevant to the equitable writ of certiorari, scream for a denial of the writ – because of laches and an unfair financial burden.[3]

Although "termination of the underlying criminal proceeding by a guilty plea . . . or by a jury verdict nearly always will lead to a lifting of [a restraining] order before appellate review is completed," *Gannett Co. v. Depasquale*, 443 U.S. 368, 377 (1979), that was not the case here. The news companies simply did not exercise due diligence. Unlike criminal trials of brief duration, trials with short

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[3] Even the procedural rules adopted by this Court can be changed to take the equities into consideration when the ends of justice so require. *See Schacht v. United States*, 398 U.S. 58 (1970) (late petition for certiorari granted where petitioner had acted in good faith and the delay in filing his petition for certiorari was brought about by circumstances largely beyond his control); *see also Felix v. Superior Court of Pima*, 92 Ariz. 247, 250, 375 P.2d 730, 732 (1962) (courts have "universally recognized that in a proper case the doctrine of laches may be applied to bar the remedy of certiorari"); *Iannella v. Johnson*, 136 N.J.L. 514, 517, 56 A.2d 894, 896 (N.J.), *aff'd*, 137 N.J.L. 659, 61 A.2d 237 (N.J. 1948), *appeal dismissed*, 336 U.S. 932 (1949) (" 'While there is no hard and fixed rule that can be laid down for a guidance on the subject-matter of laches, nevertheless, when one seeks to invoke the discretion of the court to grant the extraordinary writ of certiorari, he must prosecute his claims with due diligence.' ") (citation omitted).

life spans that have presented this Court with a good reason for granting review because of the time it takes to appeal a case,[4] this trial lasted five months. Never within that five-month period did the petitioning news companies ask for relief from this Court in any way. No petition. No motion for a stay. No application for accelerated consideration. Not a step was taken while this matter was meaningful to the defendants on trial. The news companies waited until the very last day of their 90 days to file the petition – when they knew that the July 10 order had lost meaning to us. They waited until a time when they could expect, at very least, only an academic interest by us in briefing and no wish at all to spend money and effort.

We pose this rhetorical question: if the issues are so vital to petitioners, why did they wait so long – to burden Mr. Simon and us at this sad time for him?

The news companies would prejudice Mr. Simon or us by their laches. They would force us to a meaningless appeal for Mr. Simon when all his small resources and our efforts should be spent towards the main event – his appeal.

We respectfully submit that the media petitioners should await the day when they are faced with a "gag" order again and a case where they act with "due diligence."

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[4] *See Nebraska Press Association v. Stuart*, 427 U.S. 539, 547 (1976).

2.

Certiorari is not warranted: the decision in the Second Circuit was well-reasoned and right; and beyond, there were other good and sufficient reasons to keep the stay in place on appeal – no case or controversy, among them.

We believe that the decision of the Court of Appeals for the Second Circuit was sound and followed precedent. Its rationale speaks well for itself.

Moreover, there were other reasons that made the result correct. Those reasons appear in the two extracts from the Argument section of our brief to the Court of Appeals that follow. In them, we dealt with two points overall – there never was a case or controversy in the Court of Appeals (and hence none here on review); the order was merited, narrowly drawn, precedent abiding and constitutional.

The Court should note (in considering our first extract) that the government was willing to live with the July 10 order and did.

* * *

[Extract No. 1]

THE NEWS COMPANIES LACK "STANDING" ON THIS APPEAL; FOR THEY DO NOT SATISFY THE INJURY-IN-FACT REQUIREMENT OF ARTICLE III OF THE UNITED STATES CONSTITUTION.

The news companies do not present a "case" or "controversy" under Article III of the United States Constitution and thereby lack "standing" to sue. Whatever "footing" they may have had was cut away by the litigating parties, when they either welcomed or accepted the July

10 order and did not appeal it. There are no willing speakers who feel throttled. Thus, there is no real injury or threat of real injury to the news companies caused by the July 10 order – as required by Article III. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976)); *Laird v. Tatum*, 408 U.S. 1, 13 (1972); *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (Scalia, J.). . . .

* * *

[Extract No. 2]

THE NEWS COMPANIES ARE NOT SUBJECT TO PRIOR RESTRAINT AND THE PRIOR RESTRAINT DOCTRINE AND ITS CONCOMITANTS ARE IRRELEVANT; UNDER THE PROPER "BALANCING" TEST THE JULY 10 ORDER PASSES CONSTITUTIONAL MUSTER.

Assuming for the nonce that the news companies have standing, they would still fail under the "balancing" test that protects whatever First Amendment rights they may have. Since they are not restrained, they do not properly invoke the "strict scrutiny" tests required by prior restraints on free speech. (Indeed, the news companies' interests are so shallow here that it is probably fair to say that there has been no infringement of any right of freedom of press.) When you weigh the private and public interests protected by the July 10 order as against the incidental First Amendment rights claim here, you come out handily on the side of upholding the order.

No Prior Restraint

The July 10 order sets no limit on what the news companies may print or show; they are in no danger of contempt. They can even print or display worldwide anything that is given to them by people who may be risking contempt. None of the media is denied access to a criminal trial or is restricted from disseminating any information about it. The July 10 order does not limit anyone from attending trial proceedings and to report anything that happens there. Nothing prevents the news companies from directing questions to trial counsel, defendants or to any of their agents.

In sum, there is no prior restraint on the media and prior restraint doctrine does not apply to the news companies' petition.

Analytically and in substance, there is a great difference between a restraining order against the press and a restraining order against trial participants. *See Radio & Television News Association v. United States District Court*, 781 F.2d 1443, 1446 (9th Cir. 1986); *Levine v. United States District Court*, 764 F.2d 590, 594 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986); *United States v. Alberico*, 604 F.2d 1315, 1320 n.15 (10th Cir.), *cert. denied*, 444 U.S. 992 (1979). Even the news companies' lead counsel here has recognized this in his earlier incarnation as a law review contributor – to some extent but not enough. *See* Sack, *Principle and Nebraska Press Association v. Stuart*, 29 Stan. L. Rev. 411, 426-27 (1977). A gag on a reporter is always dramatically different from a restraint on a source. It is much more intrusive – always. Moreover, the restraint on others here is of no great moment; no legal right is lost.

As we observed, the news companies have no right to demand that the trial counsel or defendants or any government official speak to them or leak information. They have no guarantee that anyone will speak to them. The rights of the media are no higher than those of the public – the rights essentially to sit, listen, watch and report on criminal trials and to ask questions if they will, but not to demand answers and unlimited speech from others. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978); *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972); *Radio & Television News*, 781 F.2d at 1446 (citing *KPNX Broadcasting Co. v. Superior Court of Maricopa*, 139 Ariz. 246, 678 P.2d 431 (1984)).

The fact that others could justly invoke the prior restraint concept does not help the news companies. They just have no standing to assert the rights of other people. *See In re "Agent Orange" Product Liability Litigation*, 96 F.R.D. 582, 584 (E.D.N.Y. 1983); *see also Levine v. United States District Court*, 764 F.2d at 594.

Thus, prior restraint doctrine and procedures do not govern this case. *See Nixon v. Warner Communications, Inc.*, 435 U.S. at 608-09; *Radio & Television News*, 781 F.2d at 1446; *Levine v. United States District Court, supra.*

The Applicable Test

Under these circumstances, where trial participants are not the challengers, the Ninth Circuit has ruled not only that prior restraint doctrine and procedures do not

apply but that "the media's collateral interest in interviewing trial participants is outside the scope of protection offered by the first amendment." *Radio & Television News*, 781 F.2d at 1447. It found that the desire to obtain information, which otherwise might be available, is insufficient "to establish an infringement of freedom of the press." *Id.*

The Ninth Circuit said, as a result, that it did not have to use "the strict scrutiny" required by a prior restraint and found on the authority of *Saxbe v. Washington Post Co.*, 417 U.S. 843, 849 (1974), no need to employ the "delicate balance" of government interest against First Amendment rights. *Radio & Television News*, 781 F.2d at 1447. The test that the Ninth Circuit saw was this:

> We need only "examine whether restrictions imposed are reasonable and whether the interests [of the government] override the very limited incidental effects of the [order] on First Amendment rights."

Id. (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 616 (1982)).

We are not certain whether the Ninth Circuit panel's reference to "delicate balance" was meant to suggest that "balancing" is the prior restraint test rather than the three-fold test urged here by the news companies and approved by the same panel in *Levine v. United States District Court*, 764 F.2d at 595 ((1) a clear and present danger or a serious and imminent threat to a protected interest, (2) a narrowly drawn order and (3) the unavailability of a less restrictive order from the opinion).

And we do not believe that this Court need or, indeed, ought to, adopt the notion that there is no infringement whatsoever (if it finds standing).

But what is clear and what analysis requires is that we are not in the prior restraint area and its rules of law; we are in the First Amendment area of (i) measuring competing private and public interests and (ii) pitting (if not "delicately balancing") them against each other in a limited access-restriction case.

The competing interests are also quite clear here.

(1) Defendants' Sixth Amendment rights to a fair trial, hailed repeatedly as the most fundamental of civil rights. *Estes v. Texas*, 381 U.S. 532, 540 (1965).		
(2) The Court's concern and duty to supervise grand jury proceedings and secrecy.	vs.	A narrow, limited, incidental and oft-questioned right to gather news from willing speakers.
(3) The Court's duties and concern about the fair administration of justice and the infringement on that by rampant, recent practices of government lawyers "trying cases in the media" before and during trials.		

Added to that equation are the pronouncements – even in prior restraint cases – that it is appropriate to impose greater restrictions on trial participants than on outsiders. *Sheppard v. Maxwell*, 384 U.S. 333, 360-63 (1966); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 564 (1976).

Applying the True Test

Measuring and pitting competing interests lead to the result we urge – upholding the July 10 order.

First, the threat here against fair trial procedures is real and substantial – we would say even clearly and presently dangerous. Judge Cannella, upon ample evidence, found a "reasonable likelihood" that unrestrained attorneys and clients would prevent a fair trial. The prosecutors here had been quick funnels to the press of information about grand jury activity and their own investigations. They had led the news media into a rotunda for a press conference. They persistently had violated his April 23 order – even after a motion to bring on contempt proceedings was filed! The head prosecutors could not abide by ordered ground rules at a big press conference, which they had persuaded Judge Cannella to let them conduct. The demeaning and unfair publicity practices of state and federal prosecutors and knowledge of recent publicity rampages by the two prosecutors here, in New Haven (the *Stanley Friedman case*) and the Bronx (the Ex-*Secretary of Labor Ray Donovan case*), were before the District Court. And the April 23 order had put a modicum of good-sense concern into the prosecutors' publicity-seeking activity. There can be no serious question that, but for the April 23 order, press conference No.

2 would have been a reprise of no-holds-barred press conference No. 1. It might have been in a rotunda, too.

In putting in place the July 10 order, Judge Cannella was rightly influenced by the responsibility he had in this case to ensure control *early on* over possible prejudicial publicity as *required* of him by *Sheppard v. Maxwell*, 384 U.S. at 361-63. He would have been remiss on this record.

Second, the order was fully justified (i) as a sanction for grand jury violations and (ii) as a remedial precedent (as we urged) for the future to make the local prosecutors toe the mark. The July 10 order protects and furthers the governmental interest in grand jury secrecy and impartiality.

On the record before him, Judge Cannella was duty-bound to consider taking steps to protect the integrity of the grand jury system and balance it against First Amendment interests. *See Wood v. Georgia*, 370 U.S. 375 (1962) (First Amendment right balanced against the sanctity of a grand jury investigation); *see also Branzburg v. Hayes*, 408 U.S. at 682 (First Amendment right of news reporters weighed against integrity of grand jury system). The District Courts have broad supervisory power to supervise grand jury proceedings and must exercise it, particularly where there has been prosecutorial impairment of the grand jury's independent role. *United States v. Hogan*, 712 F.2d 757, 761 (2d Cir. 1983). In fact, the "exercise of the court's supervisory power can extend beyond the minimum requirements set by the Constitution to encourage fair and uniform procedures in the prosecution of criminal actions." *United States v. Vetere*, 663 F.

Supp. 381, 386 (S.D.N.Y. 1987) (citing *United States v. Jacobs*, 547 F.2d 772, 776 (2d Cir. 1976), *cert. granted*, 431 U.S. 937 (1977), *cert. dismissed*, 436 U.S. 31 (1978)). This Court has admonished district courts to ensure that prosecutors are particularly careful in presenting their cases to grand juries. *United States v. Hogan*, 712 F.2d at 759 (prosecutorial misconduct in presenting extensive hearsay, including a current newspaper clipping, before grand jury mandated dismissal of indictment). *Accord United States v. Serubo*, 604 F.2d 807, 816 (3d Cir. 1979).

Hence, the District Court can exercise its authority to impose an *"ad hoc* sanction" to enforce correct performance by government attorneys in presenting evidence to the grand jury. *Id.* Indeed, in *United States v. Vetere, supra*, the District Court exercised its supervisory power to dismiss an indictment where the grand jury was made privy to a ten-year old newspaper article. 663 F. Supp. at 386. And here, too, restraints on government's own agents and officers are particularly acceptable when justice is at stake. *See Sheppard v. Maxwell*, 384 U.S. at 361.

Third, turning to the broader aspect of the administration of justice, the insult to that "government interest" and the power and duty to protect and further it also lie here and help justify the July 10 order. The District Court has promulgated a rule – S.D.N.Y. Crim. R. 7(c) – that specifically allows for the kind of tailor-made order issued here in this highly "publicized" case. But up to this case, Rule 7(c) has largely "withered" although, ever increasingly, local federal prosecutors have systematized their public relations machine and have sung paeans to themselves in multi-media events at the expense of the investigated and the indicted – not the convicted. *See*

Association of the Bar of the City of New York, *Report of the Ad Hoc Committee on Pretrial Publicity* 3, 14 (1987). We have had one-sided "trials" in Foley Square and "convictions" at news conferences upon indictments; and dancing over the accused in the rotunda of the Bronx Courthouse. There is a fashion to this, and all the complaints of bar associations and bar leaders fall on the deafest ears and seem but to loose most active tongues.

Are the courts powerless? Do we – the lawyers – have no redress? We submit that Judge Cannella took a needed and long-overdue step towards a proper moderation. We dare suggest: some very good public servants may have learned the lesson he wanted to teach and we will all be better for the order here – if only to win respect for the system from the public, from defense counsel and from those charged with the heavy duty of prosecuting the accused.

Balanced against all these considerations in those three areas of "interests" is the most secondary right of "access." It is a gossamer here. The order is reasoned and reasonable. The only thing the press is barred from receiving *from the parties* are sensational characterizations and matters beyond the public record. The public will not be cheated by that limitation. The indictment is there. The court papers are there; we shall be appearing in open court saying things. You may take judicial notice that the news media have reported and will continue to report what appears in the papers filed in court and what is said in open court. The public – all those who could possibly care – knows what is going on and what will happen. It will surely know the results.

In the meantime, we can go about our lawyering without being assaulted (literally) on the courthouse stairs, without worrying what we should say to counter the Bronx District Attorney or the United States Attorney, without being concerned that "no comment" equals an admission of guilt and without dealing with the emotions of a "circus."

In sum, the July 10 order – no prior restraint on the news companies-appellants – was more than reasonable; it was prompted by compelling events and is salutary to the extreme. Its accomplishments in protecting and promoting important personal and "governmental interests" far outweigh any minor impingement on how the news companies go about their business.

We commend the July 10 order to you and respectfully suggest that overturning it would do a significant disservice to the administration of justice and would be a signal for some to unlearn quickly its lessons in moderation.

SUPREME COURT OF THE UNITED STATES

DOW JONES & COMPANY, INC., ET AL. *v.*
STANLEY SIMON ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 88-229. Decided November 7, 1988

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

In *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), we held that an order restraining the news media from reporting or commenting on public judicial proceedings was a prior restraint on speech and that the State had not in that case overcome the high barriers to the use of a prior restraint. *Id.*, at 570. The restraining order in this case is directed against the participants in the trial, not against the media, but it is likewise challenged by various news agencies as an unconstitutional prior restraint.

This case arises out of the trial of several criminal defendants, including Representative Mario Biaggi and former Bronx Borough President Stanley Simon, on federal racketeering charges based on their involvement with Wedtech, a South Bronx military contractor. On April 23, 1987, at the request of the defendants, the district court entered an order restraining the prosecutors, defendants, and defense counsel from making extrajudicial statements to the press. The Government initially concurred in the order but eventually joined with petitioners, the news agencies, in seeking to have the order vacated. On July 10, 1987, the district court modified its order to allow the parties to state, without elaboration, matters of public record and to explain, without characterization, the substance of any motion or step in the

proceedings. Otherwise, however, the court continued the order in force.

Petitioners appealed to the United States Court of Appeals for the Second Circuit, which affirmed the July 10 order. After finding that petitioners had standing to complain, the court stated that "there is a fundamental difference between a gag order challenged by the individual gagged and one challenged by a third party; an order objected to by the former is properly characterized as a prior restraint, one opposed solely by the latter is not." *In re Dow Jones & Co.*, 842 F. 2d 603, 609 (CA2 1988). Because only the news agencies opposed the restraining order, the court concluded that a prior restraint had not been imposed. The court then held that the restraining order was justified because there was a "reasonable likelihood" that pretrial publicity would otherwise have prejudiced the defendants' rights to a fair trial. *Id.*, at 610.

By so holding, the Second Circuit joined the Ninth Circuit, which had previously refused to treat as a prior restraint a restraining order directed against the parties and challenged only by the media. Compare *Radio & Television News Assn.* v. *United States District Court*, 781 F. 2d 1443, 1446 (CA9 1986) (order challenged by media) with *Levine* v. *United States District Court*, 764 F. 2d 590, 595 (CA9 1985) (order challenged by trial participants), cert denied, 476 U. S. 1158 (1986). That approach conflicts directly with the approach taken by the Sixth Circuit, which held in *CBS Inc.* v. *Young*, 522 F. 2d 234, 239 (CA6 1975), that "the conclusion is inevitable that [such a restraining order] constitutes a prior direct restraint upon freedom of expression." Moreover, the Second Circuit's adoption of a "reasonable likelihood" standard conflicts with the Sixth Circuit's "clear and present danger" standard. *Id.*, at 238. Because of the importance of this issue and the conflicting resolutions given it by the courts of appeals, I would grant the petition for certiorari.

JUSTICE STEVENS took no part in the consideration or decision of this petition.